(8)

No. 97-704-CFX Title: Philomena Dooley, Personal Representative of the Estate of Cecelio Chuapoco, et al., Petitioners
v.
Korean Air Lines Co., Ltd.

Docketed:
October 23, 1997 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Oct 22 1997	Petition for writ of certiorari filed. (Response due November 22, 1997)
	Nov 5 1997	DISTRIBUTED. November 26, 1997
	Nov 20 1997	Brief of respondent Korean Air Lines Co, Ltd. in opposition filed.
	Dec 3 1997	REDISTRIBUTED. January 9, 1998
	Jan 9 1998	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 23, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 25, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 10, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 27, 1998. **********
	Feb 19 1998	Joint appendix filed.
	Feb 19 1998	Brief of petitioners Philomena Dooley, et al. filed.
	Mar 4 1998	Record filed.
	Mar 17 1998	Record filed.
	Mar 25 1998	Brief of respondent Korean Air Lines Co., Ltd. filed.
	Mar 25 1998	Brief amicus curiae of United States filed.
	Mar 30 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Apr 1 1998	CIRCULATED.
	Apr 3 1998	Reply brief of petitioners Philomena Dooley, et al. filed.
	Apr 6 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 27 1998	ARGUED.

No. _____

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.

— *Petitioners,*

v.

KOREAN AIR LINES CO., LTD.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

Does the general maritime law of the United States recognize a survival cause of action for predeath pain and suffering? If yes, may it be brought simultaneously with a separate wrongful death cause of action governed by the Death on the High Seas Act?

LIST OF PARTIES IN THE PROCEEDING BELOW

A. PETITIONER

Petitioners are Philomena Dooley, Personal Representative of the Estate of Cecelio Chuapoco; Robert Boyar, Executor of the Estates of Michael Truppin and Jan Moline; Carl Cole, Personal Representative of the Estate of Woon Kwang Siow; and Kimberly S. Saavedra, Personal Representative of the Estate of Jan Hjalmarrrson.

B. RESPONDENT

Respondent Korean Air Lines Co., Ltd. is a member of the Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of the Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunications Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd.
Hanjin Heavy Industries Co., Ltd.

LIST OF PARTIES IN THE PROCEEDING BELOW – Continued

Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation-SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

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PETITION FOR WRIT OF *CERTIORARI*

Petitioner Philomena Dooley, et al., respectfully requests that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on July 11, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 117 F.3d 1477 (D.C. Cir. 1997). It is also reproduced in the Appendix to this Petition at Ala-15a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1997 and Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was rejected on August 28, 1997. A16a-17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the Court of first instance was pursuant to 28 U.S.C. § 1331, Federal Question Jurisdiction, and 28 U.S.C. § 1332, Diversity of Citizenship Jurisdiction.

PROVISIONS OF LAW INVOLVED

This case arises under the Warsaw Convention, formally known as The Convention for Unification of Certain Rules Relating to International Transportation by Air,

49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 40105 note. Because the locus of the deaths was on the high seas, the survival cause of action is governed by general maritime law and the wrongful death cause of action is governed by the Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988 ed.), 46 U.S.C. App. § 761 *et seq.* 1988.

STATEMENT OF THE CASE

A. Nature of the Case

Decedents Cecilio Chuapoco, Michael Truppin, Jan Moline, Woon Kwang Siow and Jan Hjalmarrson were passengers on board KAL Flight KE007 on September 1, 1983 and were killed when the aircraft was shot down after having overflown airspace of the former Soviet Union. Each of the passengers was killed as the aircraft ultimately crashed into the Sea of Japan approximately 12 minutes after damage was incurred from shrapnel that was fired from a military jet. The passengers were all travelling on tickets such that the resulting claims are governed by the Warsaw Convention. The respective Personal Representatives of each decedents' estates brought separate survival causes of action on behalf of the estate and, in their fiduciary capacities, on behalf of the beneficiaries in wrongful death causes of action.

B. DISPOSITION BELOW

1. The Rulings of the District Court

All cases arising out of the KE007 disaster were consolidated in the District Court before Honorable Aubrey E. Robinson, Jr. for a single trial on liability. In 1989, a jury found that Korean Air Lines had committed "willful misconduct" so that the Warsaw limitation on damages were inapplicable, which finding was upheld by the District of Columbia Circuit on appeal. *See generally, In Re Korean Air Lines Disaster of September 1, 1983,* 932 F.2d 1475, 289 U.S. App. D.C. 391 (D.C. Cir.), *cert. denied sub nom. Dooley v. Korean Air Lines,* 502 U.S. 994 (1991). After liability was resolved, the District Court remanded all of the actions that had not originally been filed in the District Court for the District of Columbia to the originating Courts and proceeded with motions practice on damages issues for the approximately 24 claims that remained in the District Court for the District of Columbia.

In pretrial motions, KAL requested the court to rule that DOHSA alone governed the claims and to dismiss all nonpecuniary damages. The District Court denied the motion on the grounds that the Warsaw Convention and DOHSA both were implicated in the cases and that Article 17 of the Warsaw Convention permitted recovery for "damage sustained." *In Re Korean Air Lines Disaster of September 1, 1983,* Nos. 83-3587, ___ F.Supp. ___ (D.C. April 8, 1993) (*In Re KAL-D.C. I*).

The District Court then proceeded to try damages cases for several decedents and those cases proceeded on appeal to the United States Court of Appeals for the District of Columbia Circuit. There were, however, the

claims for the Chuapoco, Hjalmarsson, Truppin, Moline and Siow decedents still pending in the District Court when this Court accepted *certiorari* in *Zicherman v. Korean Air Lines*, 116 S.Ct. 629 (1996). When this Court accepted *certiorari* in *Zicherman*, the District Court stayed further proceedings in those cases pending resolution of the *Zicherman* issues. After the *Zicherman* decision was published, Korean Air Lines moved the District Court for summary judgment to dismiss the survival action claims for the decedents' predeath pain and suffering. The District Court granted the motion and the plaintiffs appealed. The Court of Appeals for the District of Columbia Circuit affirmed. *Dooley v. Korean Air Lines*, 117 F.3d 1477 (D.C. Cir. 1997). This Petition requests review of that decision.

2. The *Zicherman* Decision

In an action arising from the KAL KE007 disaster which was remanded by the District Court for the District of Columbia to the United States District Court for the Southern District of New York[1] which was tried there and which then proceeded through the Second Circuit appellate process,[2] this Court agreed in 1994 to hear a Petition for Writ of *Certiorari* on the issue whether loss of society damages were available in a Warsaw Convention case in which the death occurred on the high seas. *Zicherman v.*

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[1] The District Court Order addressing damage issues is reported at *In Re Korean Air Lines Disaster of September 1, 1983*, 807 F.Supp. 1073 (S.D.N.Y. 1992).

[2] *See, Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18 (2nd Cir. 1994), *rev'd* 116 S.Ct. 629 (1996).

Korean Air Lines, 116 S.Ct. 629 (1996). *Zicherman* held that Article 17 of the Warsaw Convention was merely a pass-through and that whatever damages law would ordinarily be applied should be applied in Warsaw-governed cases. *Id.* at 636. For deaths that occur on the high seas, according to *Zicherman*, DOHSA is the source of wrongful death remedies. *Zicherman* did not address the separate and independent survival cause of action created under general maritime law for predeath pain and suffering.

Zicherman substantively changed the state of the law as it related to the source of remedies for actions arising under the Warsaw Convention. Prior to *Zicherman*, *all* decisions addressing the issue had found the source of the remedies to be the treaty itself with the particulars to be defined by reference to federal common law.[3] After *Zicherman*, the courts must find an independent tort source on which to base recovery.

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[3] *See, e.g. Bowden v. Korean Air Lines*, 814 F.Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub nom. Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir. 1996), *amended on reh'g* 96 F.3d 151 (1996) WL 490375, 1996 U.S. App. LEXIS 9857 (6th Cir. Aug. 29, 1996); *Saavedra v. Korean Air Lines*, No. 84-9324 *et seq.* (C.D. Cal. Jul. 16, 1993), *rev'd in relevant part*, 93 F.3d 547 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 584 (1997); *In Re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on April 2, 1986*, 778 F.Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2nd Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993); *In Re Aircrash Disaster Near Honolulu, Hawaii on February 24, 1989*, 783 F.Supp. 1261, 1264 (N.D. Cal. 1992).

3. Post-*Zicherman* Circuit Court Decisions

When this Court accepted *certiorari* in *Zicherman*, there were KAL damages cases pending in the Sixth Circuit (*Bickel v. Korean Air Lines*[4]), the Ninth Circuit (*Saavedra v. Korean Air Lines*[5]) and the District of Columbia Circuit (*Forman v. Korean Air Lines*[6]; *Oldham v. Korean Air Lines*[7]). As well as the within actions pending in the D.C. District Court, one action (*Ephraimson-Abt v. Korean Air Lines Co., Ltd.*) is pending in the Southern District of New York, and one action (*Saavedra v. Korean Air Lines*) is pending in the Central District of California.

In *Bickel*, the Sixth Circuit originally held that there was no right to recover for predeath pain and suffering. In an amended decision on August 29, 1996, however, the Sixth Circuit reversed itself and held that Korean Air Lines had not properly preserved the issue on appeal by failing to raise it in initial briefs. *Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, 96 F.3d 151 (1996) WL 490375, 1996 U.S. App. LEXIS 9857 (6th Cir. Aug. 29,1996).

The District of Columbia Circuit Court decided *Forman, supra*, and *Oldham, supra*, and held that Korean Air

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[4] Subsequently reported at 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, 96 F.3d 151 (1996) WL 490375, 1996 U.S. App. LEXIS 9857 (6th Cir. Aug. 29, 1996).

[5] Subsequently reported at 93 F.3d 547 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 584 (1997).

[6] Subsequently reported at 84 F.3d 446 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 584 (1997).

[7] Subsequently decided on September 23, 1997, ___ F.3d ___ (D.C. Cir. 1997), 1997 U.S. App. LEXIS 26102.

lines had not preserved its right to challenge the survival action award as it had not raised the issue in the initial briefs.

The Ninth Circuit permitted KAL to overcome its procedural deficiencies by substantively addressing the issue. The Ninth Circuit erroneously misapplied *Zicherman* by not distinguishing between survival action remedies and wrongful death remedies, and disallowed the predeath pain and suffering verdict. *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 582 (1997).

4. The Decision in the Court Below

Claims on behalf of five decedents remained in the court below after *Zicherman*. Korean Air Lines moved in the District Court to dismiss all claims for nonpecuniary damages. On June 4, 1996, the court entered its decision. Under the direction of *Zicherman*, the District Court proceeded with a choice of law analysis and concluded that United States law should be applied and that DOHSA was the applicable wrongful death substantive law.

The D.C. Circuit disallowed general maritime law survival action damages for pain and suffering on the grounds that *Zicherman* held that DOHSA provided the exclusive remedy for damages and that its remedies cannot be supplemented with general maritime principles. The Court improperly failed to distinguish between wrongful death remedies and survival action remedies.

Philomena Dooley, Kimberly S. Saavedra, Robert Boyar, Carl Cole as Personal Representatives of the

Estates of Cecilio Chuapoco, Jan Hjalmarrson, Michael Truppin, Jan Moline and Woon Kwang Siow, respectively, now petition this Court for writ of *certiorari*.

REASONS FOR GRANTING THE PETITION

There are three compelling grounds for this court to grant *certiorari* and review the decision below.

1. A clear conflict now exists among circuit courts as to whether a general maritime law survival cause of action for a decedent's predeath pain and suffering exists and, if so, if it may co-exist with a wrongful death cause of action under the Death on the High Seas Act. As this Court noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), several Courts of Appeals have identified that there is a general maritime right of survival. *Id.* at 34, *citing Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 909 (CA8, 1972); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (CA1, 1974); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (CA5, 1975); *Evich v. Connelly*, 759 F.2d 1432 (CA9, 1985). And in *Yamaha Motor Corp. v. Calhoun*, 116 S.Ct. 619, 625 n.7 (1996), this Court assumed without deciding that a general maritime law survival cause of action is created by *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), citing *Miles, supra*. Given that this Court has never directly addressed the issue, the Courts of Appeals for the First, Fifth and Eighth Circuits have taken guidance from the Court's inferences in *Miles* and *Moragne* and identified a general maritime survival action. The District of Columbia Circuit's decision, unlike those of all other Circuits except the Ninth, ignores the distinction between

the survival cause of action and the wrongful death cause of action, which this Court has itself specifically identified. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76, n.2 (1974).

2. The decision below misapplied this Court's opinions in *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and *Zicherman*, each of which addressed only **wrongful death remedies,** by focusing solely on DOHSA's limitations on nonpecuniary damages to the improper exclusion of the separate survival cause of action. The misinterpretation will cause significant confusion among the lower courts unless clarified by this court.

3. There are still several cases pending in the District and Circuit Courts arising from the KAL disaster that would benefit from this Court's answer to the issues raised. Moreover, the Death on the High Seas Act may arguably be applied to claims arising from the TWA Flight 800 disaster which occurred off the coast of new York on July 17, 1996 in which 230 persons perished. That flight was also governed by the Warsaw Convention. Potentially 230 wrongful death and survival claims may be brought in United States courts. The issues raised are not isolated or scarce cases. This Court should provide definitive guidance on the elements of damage to prevent conflicting and inconsistent results.

ARGUMENT

This Court has never directly addressed the issue whether a general maritime law survival action exists for predeath pain and suffering, but has strongly implied at least three times that there is. *See, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) ("Wrongful death statutes are to be distinguished from survival statutes."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (noting that several courts of appeal have identified a general maritime survival cause of action for predeath pain and suffering as such claims have been "widely accepted."); *Yamaha Motor Corp v. Calhoun*, 116 S.Ct. 619, 625 n.7 (assuming without deciding that a general maritime survival action is created by *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).)

In light of this Court's broad inferences that a general maritime law survival action exists, the First, Second, Fifth and Eighth Circuits have identified common law survival causes of action for predeath pain and suffering. Only the District of Columbia Circuit and Ninth Circuit have departed from that posture. Prior to this case, the District of Columbia Circuit had not previously addressed the issue, but should have repudiated the Ninth Circuit analysis and adopted that of the First, Second,[8] Fifth and Eighth Circuits and established that there exists a general maritime law survival cause of action for predeath pain and suffering.

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[8] The Second Circuit *Zicherman* decision held that federal maritime law supplied the measure of damages but did not specifically apply it to the pain and suffering claim as KAL has not challenged the legal basis to assert the claim on appeal.

I.

THE SURVIVAL CAUSE OF ACTION IS NOT AFFECTED BY DOHSA

A. THE SURVIVAL CAUSE OF ACTION IS A REMEDY SEPARATE AND DISTINCT FROM WRONGFUL DEATH REMEDIES.

Courts have consistently recognized that survival causes of action for pre-death pain and suffering are separate and distinct from claims for wrongful death. Each kind of remedy is designed to compensate for different kinds of loss. *Moragne, supra*, 398 U.S. at 381 (a single tortious act might result in two distinct harms giving rise to two separate causes of action, *e.g.*, a survival cause of action and wrongful death cause of action.); *Sea-Land Services, Inc., supra*, 414 U.S. at 578; *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984), citing *Sea-Land Services, Inc., supra at* 573, 575 n. 2; *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277, 1284-85 (W.D. Pa. 1983); *Chute v. United States*, 466 F.Supp. 61, 62 (D. Mass. 1978); *Ospina v. Trans World Airlines*, 778 F.Supp. 625, 629 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992).

On the one hand, the wrongful death cause of action is designed to compensate the beneficiaries of the decedent for the losses that they themselves have sustained as a result of the decedent's death. Typically the elements of damages in a wrongful death claim include loss of support; loss of financial contributions; loss of parental advice, guidance, and training; loss of inheritance; loss of services; and, in many instances, nonpecuniary damages for loss of society. *Azzopardi, supra*, 742 F.2d at 893; *Kuntz,*

supra, 573 F.Supp. at 1284; *Chute, supra*, 466 F.Supp. 62. Depending on the statute involved, the plaintiff(s) may be the individual beneficiaries themselves or the personal representative of the estate, who holds the cause of action in a fiduciary capacity to distribute to the beneficiaries in accordance with provisions of the death statute or intestacy laws, as the case may be. The personal representative, as an entity, has no claim. *See, generally,* Speiser, Krause & Madole, *Recovery for Wrongful Death and Injury 3d* § 3:1, § 3:2 (3d edition, 1992).

On the other hand, the survival cause of action is designed to compensate the personal representative of the decedent's estate (as the replacement holder of the claim after the injured person dies) for damages that the decedent himself could have recovered but for his death. *Azzopardi, supra,* at 893; *Chute,* 466 F.Supp. at 52; *Kuntz, supra,* at 1284.

This Court, in *Yamaha Motor Corp. v. Calhoun*, 116 S.Ct. 619, 113 L.Ed.2d 578, 64 USLW 4048 (1996), *aff'd*, 40 F.3d 622 (3d Cir. 1994), recently affirmed the decision by the Court of Appeals for the Third Circuit, which decision included the following succinct explanation of the distinction between the wrongful death cause of action and the decedent's action for pain and suffering preceding death:

> . . . Throughout the previous discussion of the case law, reference has been made to wrongful death actions and to survival actions. Although they are often lumped together without any distinction . . . they are, in fact, quite distinct . . .
>
> A wrongful death cause of action belongs to the decedent's dependents (or closest kin in the case

> of the death of a minor). It allows the beneficiaries to recover for the harm that *they* personally suffered as a result of the death, and it is totally independent of any cause of action the decedent may have had for his or her own personal injuries. Damages are determined by what the beneficiaries would have "received" from the decedent . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the *deceased* from the action causing death. Under a survival action, the decedent's representative recovers for the decedent's pain and suffering, medical expenses, lost earnings . . . and funeral expenses . . . *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 737-38 (3d Cir. 1994) (citations omitted; emphasis by the Court).

Since the two kinds of actions (death and survival) encompass separate and distinct measures of damages and beneficiaries, "American courts have painstakingly distinguished the two causes of action for many years." *Kuntz, supra,* 573 F.Supp. at 1285. Thus, the legislative allowances and limitations contained in wrongful death statutes (including DOHSA) simply do not address a survival cause of action.

See, also, *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *rev'd on other grounds*, 498 U.S. 19 (1990); *Walstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1093 (2d Cir. 1993).

B. GENERAL MARITIME LAW PROVIDES FOR A SURVIVAL ACTION FOR PRE-DEATH PAIN AND SUFFERING.

At common law, it was generally believed that there was no right to recover in a survival action for a decedent's pre-death pain and suffering once he/she were killed, any more than it was believed that there was a right to recover at common law for a wrongful death. In *Moragne*, however, this Court indicated skepticism that there was any legitimate historical basis for the denial of a common law recovery for death and repudiated prior decisions that invoked that unsubstantiated belief. 398 U.S. at 378-89.

Moragne established that general maritime law provided a cause of action for wrongful death in territorial waters. In *Moragne*, this Court specifically noted that the law of the United States could change by common acceptance among the states of a policy permitting recovery for wrongful death, which policy itself becomes a part of American jurisprudence. *Id.* at 390. Similarly, in the spirit of *Moragne*, a survival cause of action must be acknowledged under general maritime common law since the majority of states permit some kind of survival actions and all of those states which do permit survival action permit recovery for conscious pre-death pain and suffering. *Ospina, supra*, 778 F.Supp. at 630. *Barbe v. Drummond*, 507 F.2d 795, 799-800 (1st Cir. 1974).

In *Sea-Land, supra*, 414 U.S. at 577-78, this Court specifically noted that *Moragne* had established the distinction between a cause of action for the person injured to be made whole and a cause of action in the case of

death for the loss of his dependents, *id.* citing *Moragne*, 398 U.S. at 382. In *Sea-Land*, the decedent had been severely injured and had recovered an amount for his disability and pain and suffering before he died. He died shortly after that action was terminated and his widow brought a wrongful death action. Sea-Land moved to dismiss the death action, arguing there was no loss independent of the decedents' claim for his personal injuries. This Court quickly rejected that argument, holding that there was one claim personal to the injured person and a separate, independent cause of action in the event of death for the decedents' dependents. *Id.*

Following *Moragne*, many federal circuit and district courts relied on its rationale to hold that the general maritime law encompassed a general maritime survival action, one that permitted recovery for conscious pain and suffering. *See, e.g., Miles v. Melrose; Zicherman, supra*, 43 F.3d at 23; *Greene v. Vantage Steamship Corp.*, 466 F.2d 159, 166 (4th Cir. 1972). *Barbe, supra*, 507 F.2d at 799; *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *Spiller v. Thomas M. Lowe, Jr. Associates*, 466 F.2d 903, 909 (8th Cir. 1972); *Self v. Great Lakes Dredge and Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987); *Anderson v. Whitaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 623 (5th Cir. 1981); *Kuntz, supra*, 573 F.Supp. at 1284; *Chute v. United States, supra*, 466 F.Supp. at 69; *McAleer v. Smith*, 791 F.Supp. 923, 926 (D.R.I. 1992); *Rye v. United States Steel Mining Co.*, 856 F.Supp. 274, 279 (E.D. Va. 1994); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F.Supp. 1151, 1156 (S.D. Fla. 1992); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F.Supp.

1559, 1569 (N.D. Ga. 1995); *Newhouse v. United States*, 884 F.Supp. 1389, 1393 (D.Nev. 1994).

The general maritime survival cause of action is separate and distinct from, and ungoverned by, any wrongful death remedy, whether the death remedy is DOHSA, the Jones Act (46 U.S.C. App. § 688 *et seq.*), or a *Moragne* cause of action.

C. DOHSA ADDRESSES ONLY WRONGFUL DEATH CLAIMS AND NOT SURVIVAL ACTION CLAIMS.

DOHSA is a wrongful death statute and contains no survival provision which leaves a legislative void which, in turn, allows the general maritime law survival action based on *Moragne* to supplement the wrongful death remedies under DOHSA. This precept has been accepted by the First Circuit (*Barbe, supra*), the Fifth Circuit (*Azzopardi, supra; Law, supra*), the Second Circuit (*Zicherman, supra*), and, in the context of a *Moragne* death action, by the Eighth Circuit (*Spiller, supra*). Only the District of Columbia Circuit and the Ninth Circuit have rejected the precept.

The District of Columbia Circuit Court's reliance on this Court's decision in *Mobil Oil Corp. v. Higginbotham*, 98 S.Ct. 2010 (1978) to suggest that DOHSA precludes the use of a general maritime law survival action to supplement the recovery allowed under DOHSA is misplaced. A18a-19a. *Higginbotham* involved *only* the question of whether nonpecuniary damages for loss of society could be recovered in the *death action* under DOHSA by use of general maritime law. This Court, speaking only to remedies available in the death action, held that damages

recoverable under DOHSA could not be supplemented by general maritime law to provide a recovery for loss of society. *Higginbotham* addressed only the wrongful death remedies, not the separate survival remedies. Virtually every case decided *after Higginbotham* has limited its holding to the wrongful death action, establishing that the limitations of DOHSA for the death action have no preclusive effect on a survival action even though the injuries occur from the same circumstances that ultimately caused the death on the high seas. *Barbe, supra*, 507 F.2d at 800. ("[Acknowledging a general maritime survival action] also avoids a conflict with DOHSA, since survival and wrongful death actions have long been recognized as distinct causes of action." (citations omitted)); *Azzopardi, supra*, 742 F.2d at 893; *Kuntz, supra*, 573 F.Supp. at 1285; *Chute, supra*, 466 F.Supp. at 69; *McAleer, supra*, 791 F.Supp. at 926-27; *Gray, supra*, 880 F.Supp. at 1569; *Law; In Re Air Crash Disaster Near Honolulu, Hawaii*, 783 F.Supp. 1261, 1264 (N.D. Cal. 1992); *Rye v. United States Steel Mining Corp.*, 856 F.Supp. 274, 279 (E.D. Va. 1994).

Since DOHSA does not address a survival action for pre-death pain and suffering, it leaves, in effect, a gap in the coverage provided by DOHSA. As Justice Stephens pointed out in *Higginbotham, supra*, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." 98 S.Ct. at 2015. Because DOHSA is a wrongful death statute and not a survival statute, the federal courts are free to fill what otherwise would be a legislative void by creating a federal survival action for pain and suffering which would apply to persons who were subsequently killed on the high seas by the same

events. *See, e.g., Barbe, surpa,* at 799-800; *Chute, supra,* 466 F.Supp. at 69; *Azzopardi, supra,* 742 F.2d at 893.

Subsequent to *Higginbotham,* this Court addressed some of the issues relating to the general maritime survival cause of action in *Miles, supra,* an action brought under the Jones Act and general maritime law. The mother of a deceased seaman claimed a recovery under a general maritime law survival action for the seaman's pre-death pain and suffering and for loss of his future wages. The Fifth Circuit found that the survival cause of action encompassed a right to recover for both the decedent's pre-death and suffering and for his lost future wages. *Id.* 882 F.2d at 986. The Fifth Circuit confirmed the survival cause of action for pain and suffering by following the rationale of *Moragne* that, since almost all the states and the Jones Act provided for a pre-death pain and suffering claim under the survival action, such remedies had become a part of common law through the general maritime law.

On *certiorari,* this Court noted without criticism that many Courts of Appeals had identified a general maritime action surviving the death of a seaman because survival actions had gained widespread acceptance. 498 U.S. at 34. This Court refused, however, to generally address the breadth of the recovery under the survival action, and limited its decision to the issue of whether there was a right to recover for loss of future earnings. It denied the loss of earnings recovery by noting that only a few states permitted a recovery in a survival action for lost future earnings. 498 U.S. at 35. This notation was by way of comparison with the kind of "wholesale" and "unanimous" policy judgment that was in effect in the

states of the United States that had prompted this Court to create the new cause of action in *Moragne. Id.* at 34. This Court reasoned that, since the considered judgment of a large majority of American legislatures was to preclude recovery for loss of future income in a survival action, that recovery as a measure of damages had not become the general law of the United States. In contrast, where the clear majority of states and the Jones Act permit a survival claim for pre-death pain and suffering, it is reasonable that such a remedy *has* become the general law of the United States. *See, Azzopardi, supra,* 742 F.2d at 893.

It is also significant that this Court commented without criticism on the several lower Courts of Appeals' reliance on the plethora of state survival statutes as dictating a change in the general maritime rule against survival (*id.* at 34) and left undisturbed the survival action of pre-death pain and suffering. If this Court felt that the pain and suffering was a legally insufficient claim, or that general maritime law did not include that remedy, it could easily have addressed those issues in the context of the decision it *did* reach as the issue was encompassed in its grant of *certiorari.*

The underlying assumption, i.e., that there is and was no common law right to recover for survival or death, has been repudiated by *Moragne.* Moreover, this Court has assumed that *Moragne* encompasses a survival action for predeath pain and suffering. *Yamaha Motor Corp., supra,* at 116 U.S. at 625 n.7, thus acknowledging the distinction between the two kinds of actions again.

The court below ignored this Court's comments in *Gaudet, Miles* and *Yamaha Motor Corp.*, which discussed survival action remedies, by focusing solely on *Zicherman* and *Higginbotham*, which discussed only wrongful death remedies. The court below erred in doing so.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE CIRCUITS WHETHER A GENERAL MARITIME LAW SURVIVAL ACTION EXISTS AND WHETHER IT MAY BE JOINED WITH A WRONGFUL DEATH ACTION UNDER DOHSA

Certiorari should be granted to determine that a general maritime survival cause of action exists under an analysis akin to that in *Moragne*, which identified a general maritime law wrongful death cause of action. The traditional maritime rule disallowing a survival right has been changed by the widespread acceptance of a survival cause of action for predeath pain and suffering. *See, Yamaha Motor Corp., supra* 116 S.Ct. at 625 n.7 (1996) (" . . . we assume without deciding that *Moragne* also provides a survival action.")

Once the Court identifies that a survival right exists, it should resolve the conflict in the Circuits and hold affirmatively that the survival action may co-exist with a DOHSA death action and that DOHSA limitations on nonpecuniary damages do not abrogate survival action remedies.

As has been shown, the District of Columbia Circuit's denial of a general maritime law survival cause of action where the wrongful death cause of action arises under

DOHSA contravenes decisions exactly to the contrary in the First Circuit, *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974), and the Fifth Circuit, *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984), *Law v. Sea Drilling Corp.*, 523 F.2d 793, 794-95 (5th Cir. 1975) each of which dealt with a survival action in the context of the death action arising under DOHSA.[9] The District of Columbia Circuit's decision also contravenes the logic and legal analysis of the Eighth Circuit, which permitted a general maritime survival action to be joined with a *Moragne* general maritime death action. *See, Spiller v. Thomas M. Lowe, Jr. Assoc., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972).

III.

CERTIORARI SHOULD BE GRANTED TO CORRECT THE DISTRICT OF COLUMBIA CIRCUIT'S MISAPPLICATIONS OF THIS COURT'S DECISION IN *MOBILE OIL CORP., MILES,* AND *ZICHERMAN*

The rationale that the District of Columbia Circuit used to substantiate its decision shows a fundamental misperception of this Court's decisions in *Mobile Oil Corp.*

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[9] Several District courts have also found a general maritime law survival cause of action which may be brought simultaneously with a DOHSA death action; *Gray v. Lockheed Aeronautical Systems*, 880 F.Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. United States Steel Mining Co.*, 856 F.Supp. 274, 279 (E.D. Va. 1994); *Chute v. United States*, 466 F.Supp. 61, 69 (D. Mass. 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277, 1285 (W.D. Pa. 1983); *Favoloro v. S/S Golden Gate*, 687 F.Supp. 475, 479 (N.D. Cal. 1987); *McAleer v. Smith*, 791 F.Supp. 923 (D.R.I. 1992).

and *Zicherman*. Each of those decisions related to whether a particular type of *wrongful death* element of damage was available in a DOHSA wrongful death action, e.g., loss of society. Here, the type of damage at issue, i.e., the recovery for the decedent's pain and suffering, is peculiarly a survival action remedy, not a wrongful death remedy.

The District of Columbia Circuit also misapprehends this Court's decision in *Miles, supra*. The court correctly read *Miles* as disallowing recovery of non-pecuniary wrongful death damages under the general maritime law, but failed to address its application to a separate survival claim. The *Miles* Court indicated that several Circuits had identified a general maritime survival action and cited Circuit decisions that had found the right included claims for predeath pain and suffering, which *had* been widely adopted and accepted. 498 U.S. at 34. Indeed, the *Miles* Court had been asked to do what petitioners now request and to specifically acknowledge a general maritime survival action. *Miles* declined to do so only because it was unnecessary to the narrow issue presented here. *Id. Certiorari* should be granted to answer this important question that has been pending unanswered since *Miles*.

Lastly, the District of Columbia Circuit misapprehends the Court's recent decision in *Zicherman*. The *Zicherman* court addressed typical wrongful death damages. In this case, petitioner is not seeking to "supplement" statutory wrongful death damages. Rather, petitioner is seeking acknowledgment of the propriety of asserting a distinct survival cause of action remedy with

whatever damages are permissible under the death cause of action.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *certiorari* should be granted in all respects.

Dated: October 21, 1997

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 6, 1997 Decided July 11, 1997

No. 96-5278

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

PHILOMENA DOOLEY, ET AL. V. KOREAN AIR LINES CO., LTD.

Appeal from the United States District Court
for the District of Columbia
(83ms00345)

Juanita M. Madole argued the cause and filed the briefs for appellants.

Andrew J. Harakas argued the cause for appellee. With him on the brief was *George N. Tompkins, Jr.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD and RANDOLPH, *Circuit Judges*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: On September 1, 1983, while Korean Air Lines flight KE007 was en route from New York City to Seoul, South Korea, via Anchorage, Alaska, a Soviet military aircraft shot down the airliner over the Sea of Japan, killing all 269 people on board. We have recounted details of the tragedy elsewhere. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476-79 (D.C. Cir. 1991).

In the ensuing litigation, a joint liability trial on the claims of 137 plaintiffs took place in the United States District Court for the District of Columbia. A jury found that Korean Air Lines had committed "willful misconduct," thus removing the Warsaw Convention's limitations on liability. This court affirmed. *Korean Air Lines Disaster*, 932 F.2d at 1479-84. (We did, however, vacate an award of punitive damages. *Id.* at 1484-90.) The actions were then remanded to the courts in which they had originated for individual proceedings on compensatory damages. This case comes to us as an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), in five damages actions that have not yet gone to trial.

Early in the damages phase of the litigation, the district court rejected Korean Air Lines's argument that the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, restricted the damages plaintiffs could recover. As discussed later, the Act permits only certain surviving relatives to recover "pecuniary" losses. The district court

believed another law – Article 17 of the Warsaw Convention (*see* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 3018) – "allows for the recovery of all 'damages sustained,' " meaning any "actual harm" any party "experienced" as a result of the crash. Thereafter, the Supreme Court reached a different conclusion: the Warsaw Convention, rather than providing a measure of damages, "permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules." *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629, 637 (1996).

After the *Zicherman* decision, Korean Air Lines moved in the district court to dismiss all claims for nonpecuniary damages, including damages for loss of society and mental grief, and damages for the decedents' predeath pain and suffering. Because *Zicherman* directed lower courts to look to some source of domestic law in a Warsaw Convention case, the district court began with a choice-of-law analysis and concluded that United States law governed these suits. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 12-14 (D.D.C. 1996). No party has challenged that determination. The court then ruled that the Death on the High Seas Act provided the applicable U.S. law, *id.* at 14, and that the Act did not permit the recovery of nonpecuniary damages, *id.* at 14-15.

Plaintiffs detect two faults in the district court's reasoning. While they concede that the Death on the High Seas Act itself provides no right to recover damages for a decedent's pre-death pain and suffering, they believe the

"general maritime law" recognizes such a cause of action. They also interpret a provision of the Death on the High Seas Act as allowing them to proceed under South Korean law despite the district court's undisputed choice-of-law finding that U.S. law applies. The law of South Korea, they say, permits them to recover damages for pre-death pain and suffering and for the mental grief of surviving relatives.

I

The first section of the Death on the High Seas Act allows the personal representative of any person who dies as the result of a "wrongful act, neglect, or default occurring on the high seas," to sue "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761.[1] The next section limits recovery to "a fair and just compensation for the pecuniary loss sustained by the persons for whose

[1] Section 761 states in full:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

benefit the suit is brought." *Id.* § 762.[2] Other sections establish a limitations period, *id.* § 763a, govern actions under foreign law, *id.* § 764, permit a personal injury suit to continue under the Act if the plaintiff dies while the action is pending, *id.* § 765, bar contributory negligence as a complete defense, *id.* § 766, exempt the Great Lakes and state territorial waters from the Act's coverage, *id.* § 767, and preserve certain state law remedies and state court jurisdiction, *id.*; *see also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-33 (1986).

That the Death on the High Seas Act does not permit recovery for a decedent's pre-death pain and suffering is clear enough. The Act provides a remedy only for injuries suffered by a limited class of surviving relatives, not the decedent. It is, after all, a "wrongful death" statute, giving survivors a right of action for losses they suffered as a result of the decedent's death, not a "survival" statute, allowing a decedent's estate to recover for injuries suffered by the decedent. *See Nelson v. American Nat'l Red Cross*, 26 F.3d 193, 199 (D.C. Cir. 1994); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 637 (3d Cir. 1994), *aff'd*, 116 S. Ct. 619 (1996); *McInnis v. Provident Life & Accident*

[2] Section 762 provides:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Ins. Co., 21 F.3d 586, 589 (4th Cir. 1994). Pain and suffering is, in any event, nonpecuniary.[3] On the other hand, § 762 of the Act permits only the recovery of "compensation for . . . pecuniary loss sustained."

Plaintiffs do not quarrel with any of this. But, they say, the Death on the High Seas Act is not the only pertinent source of U.S. law. As they see it, "general maritime law" – a species of federal common law – also applies and it allows a survival action for pre-death pain and suffering independent of any action under the Death on the High Seas Act.

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[3] Courts often point to pain and suffering as an example of a nonpecuniary loss. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 544 n.10 (1991); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 939 (1st Cir. 1995); *Korean Air Lines Disaster*, 932 F.2d at 1487. It is therefore strange to find several cases under the Jones Act, 46 U.S.C. App. § 688, describing damages for pre-death pain and suffering as pecuniary. *See, e.g., Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1090 n.7 (4th Cir. 1985); *Neal v. Barisich, Inc.*, 707 F. Supp. 862, 867 (E.D.La.), *aff'd*, 889 F.2d 273 (5th Cir. 1989). The Jones Act applies the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), to seamen. While FELA and the Jones Act permit only pecuniary wrongful death damages, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 68-71 (1913), FELA contains a survival provision (45 U.S.C. § 59) allowing recovery of damages for pre-death pain and suffering, *see St. Louis, Iron Mountain & Southern Ry. v. Craft*, 237 U.S. 648, 658 (1915). Rather than mislabeling pain and suffering as a pecuniary loss in Jones Act cases, it would be more accurate to recognize that under FELA and the Jones Act only wrongful death damages, not survival damages, need be pecuniary. *See Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 748-49 (9th Cir. 1980).

The Supreme Court identified a wrongful death cause of action under the general maritime law in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The death in *Moragne* occurred in waters within the state of Florida, *id.* at 376, so the Death on the High Seas Act did not apply. The Court held that general maritime law nevertheless provided the decedent's widow with a remedy for wrongful death caused by a violation of federal maritime duties. *Id.* at 409. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585-90 (1974), in which the death occurred in Louisiana waters, the Court held that recovery in a *Moragne* wrongful death action is not limited to pecuniary damages, as it is in actions under the Death on the High Seas Act. (Although the Court permitted nonpecuniary damages for loss of society in *Gaudet*, it said that "mental anguish or grief . . . is not compensable under the maritime wrongful-death remedy," 414 U.S. at 585 n.17.) A few years after *Gaudet*, the Court held that if a death occurs on the high seas, the Death on the High Seas Act, not general maritime law, governs and therefore nonpecuniary wrongful death damages may not be recovered. *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 622-26 (1978).

The Supreme Court has declined to say whether the reasoning of *Moragne* may be extended to permit a survival cause of action under the general maritime law. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990). We have never addressed the issue. Other courts of appeals have and a majority of them recognize survival actions. *See, e.g., Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4

F.3d 1084, 1093 (2d Cir. 1993); *Ward v. Union Barge Line Corp.*, 443 F.2d 565, 569 (3d Cir. 1971), *overruled in part on other grounds by Cox v. Dravo Corp.*, 517 F.2d 620 (3d Cir. 1975) (en banc); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 166 (4th Cir. 1972); *Miles v. Melrose*, 882 F.2d 976, 986 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987).

Three courts of appeals have dealt with the availability of a general maritime law survival action for deaths on the high seas. The First and Fifth Circuits have permitted general maritime law survival actions in cases in which the Death on the High Seas Act also applies. *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Barbe*, 507 F.2d at 799-800. The Ninth Circuit reached the opposite conclusion. *See Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir. 1996).[4] We believe the Ninth Circuit got it right.

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[4] Like the general maritime law, state wrongful death statutes may not be used to supplement Death on the High Seas Act remedies with nonpecuniary damages. *Tallentire*, 477 U.S. at 232. And although the Supreme Court has held that state survival and wrongful death statutes apply to at least some deaths occurring in territorial waters, *Yamaha*, 116 S. Ct. at 626-29, it has not said whether state survival statutes can apply to deaths on the high seas, *see Tallentire*, 477 U.S. at 215 n.1. A few lower courts have allowed recovery under a state survival statute to supplement recovery under the Death on the High Seas Act. *See, e.g., Solomon v. Warren*, 540 F.2d 777, 792 n.20 (5th Cir. 1976); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388-92 (3d Cir. 1971).

Assume general maritime law provides a survival action in some cases (we do not decide whether it does). Still, the effect of the Supreme Court's decision in *Higginbotham* must be evaluated. Nonpecuniary damages may be recovered under general maritime law, but not, the Court held, when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages. "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Higginbotham*, 436 U.S. at 623. "The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Id.* at 625. *Moragne* developed general maritime law in a space Congress had not occupied. But "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

Higginbotham thus instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

At almost the same time as the Sixty-Sixth Congress passed the Death on the High Seas Act, it enacted the Jones Act, 46 U.S.C. App. § 688. *See* Death on the High Seas Act, ch. 111, 41 Stat. 537 (1920); Merchant Marine (Jones) Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920). The Jones Act contains a survival provision applicable to certain maritime deaths. *See supra* note 3. A fair assumption is that the members of Congress who passed the Death on the High Seas Act understood the difference between wrongful death and survival actions. Their inclusion of a survival remedy in the Jones Act but not in the Death on the High Seas Act scarcely seems inadvertent.

Higginbotham stated that the Death on the High Seas Act expressed a congressional "judgment on such issues as . . . survival, and damages." 436 U.S. at 625. In support, the Court cross-referenced a footnote citing 46 U.S.C. App. § 765, a provision allowing a personal injury suit, initiated by a plaintiff who dies while the suit is pending, to be continued under the Act. A law professor has criticized the Court's statement as "casual," or "at best dictum and conceivably nothing more than an ill-advised gratuitous remark." Joseph F. Smith, Jr., *A Maritime Law Survival Remedy: Is There Life After Higginbotham?*, 6 MAR. LAW. 185, 196, 198 (1981). Dictum yes, ill-advised no. That the Death on the High Seas Act contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted. When Congress decides to go only so far it necessarily has decided to go no further.[5]

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[5] One of the drafters of the Death on the High Seas Act explained the Act's unusual, limited survival provision. The Act originally required suits to be filed "within two years from the date of [the] wrongful act, neglect, or default." Ch. 111, § 3, 41 Stat. 537. The survival provision of § 765 preserved for defendants the benefits of the Act's restricted limitations period without creating an undue barrier for wrongful death actions in cases in which the death did not occur soon after the event causing the injury. In such cases, a suit filed within two years while the decedent was still alive would preserve the action. *See* Robert M. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 126 (1921).

While the contours of plaintiffs' proposed survival action for deaths on the high seas are uncertain, they presumably would allow a decedent's estate to recover compensation for the decedent's injuries. This would necessarily expand the class of beneficiaries in the Death on the High Seas Act, which does not include decedents' estates. Yet *Higginbotham* held that "it would be no more appropriate to prescribe a different measure of damages than to prescribe . . . a different class of beneficiaries." 436 U.S. at 625. It was, to the Court, unthinkable that a legislatively-mandated class of beneficiaries could be judicially altered. Suits under the Act are "for the *exclusive* benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761 (emphasis added). In a death on the high seas case, there is no relevant difference between a court's giving a decedent's nondependent niece a right of action under general maritime law, which is clearly impermissible, and allowing the decedent's estate to sue for the decedent's injuries under the general maritime law.

Perhaps plaintiffs envisage a survival action that would not alter the Death on the High Seas Act's beneficiary class. One might permit a decedent's personal representative to sue for damages suffered by the decedent, but only for the benefit of those named in the Act. For example, the Federal Employers' Liability Act and the Jones Act give a decedent's personal representative the right to recover survival damages for the benefit of a fixed class of surviving relatives. *See* 45 U.S.C. § 59; 46 U.S.C. App. § 688.[6] Such an approach could leave the Death on the High Seas Act's beneficiary class intact. But it would change the damages available to the Act's beneficiaries. No longer would damages be limited to "compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought," 46 U.S.C. App. § 762. The beneficiaries would also receive compensation for nonpecuniary losses sustained by others – their decedents. That result *Higginbotham* forecloses.

Because the Death on the High Seas Act is a "wrongful death" statute, plaintiffs insist it has no bearing on survival remedies. They have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may

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[6] Under 45 U.S.C. § 59:

> Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. . . .

not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Plaintiffs also offer comparisons to the Jones Act, emphasizing that general maritime law remedies exist alongside Jones Act statutory remedies. The Jones Act provides compensation to seamen injured as a result of negligence, and in the event of death it provides both a wrongful death and a survival action. *See* 46 U.S.C. App. § 688; 45 U.S.C. §§ 51, 59. In *Miles*, the Supreme Court held that after *Moragne* a seaman's survivors could pursue a general maritime law wrongful death action alleging unseaworthiness (a strict liability theory), in addition to a Jones Act negligence claim. *Miles*, 498 U.S. at 29-30. Plaintiffs may have identified an inconsistency in how the Court treats the Jones Act and how it treats the Death on High Seas Act. But this case involves the Death on the High Seas Act, and we therefore are bound to follow *Higginbotham*. Moreover, *Miles* severely restricted the extent to which the general maritime law may expand the remedies available under the Jones Act. Relying on *Higginbotham*, the Court refused to allow the decedent's survivors to recover nonpecuniary wrongful death damages under the general maritime law because they could not recover such damages under the Jones Act. *Miles*, 498 U.S.

at 30-33. So while the general maritime law permits recovery for violations of duties other than those imposed by the Jones Act, such recovery may not exceed the recovery that would be available under the Jones Act if it applied. It is thus uncertain how much mileage plaintiffs could get out of their Jones Act analogy even if we disregarded the Court's pronouncements in *Higginbotham*.

II

Plaintiffs invoke South Korean law on the basis of this provision of the Death on the High Seas Act:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

46 U.S.C. App. § 764. As plaintiffs read § 764, it allows them to use an action under the Death on the High Seas Act to assert claims cognizable under foreign law. They have submitted the statement of a South Korean attorney that South Korean law would allow the recovery of damages for the decedents' pre-death pain and suffering and for the surviving relatives' mental anguish. The district court rejected the plaintiffs' submission as "irrelevant" in light of its determination that U.S. law applied. *Korean Air Lines Disaster*, 935 F. Supp. at 14 n.2.

The case law regarding § 764 is not uniform. Some opinions seem to support plaintiffs' view of § 764. *See Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459, 1467 (D.R.I. 1986); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1004-06 (S.D.N.Y. 1966); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94, 96 (S.D.N.Y. 1957); *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619, 622 (S.D.N.Y. 1952). Other opinions support the view that § 761 and § 764 are mutually exclusive and that plaintiffs therefore may not simultaneously advance claims under both U.S. and foreign law. *See In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175, 1185-88 (W.D.Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F. Supp. 594, 596-97 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962); *The Vulcania*, 41 F. Supp. 849 (S.D.N.Y. 1941), *modifying* 32 F. Supp. 815 (S.D.N.Y. 1940); *The Vestris*, 53 F.2d 847, 855-56 (S.D.N.Y. 1931).

If plaintiffs were correct, § 764 would license them to pick and choose among provisions of U.S. and South Korean law in order to assemble the most favorable package of rights against the defendant. That would be odd enough. But stranger still is the notion that South Korean law has any bearing on this case. Faced with *Zicherman*'s directive to make a choice-of-law determination, 116 S. Ct. at 637, the district court chose U.S. law, not South Korean law. Plaintiffs have not appealed this ruling. So how does South Korean law enter the picture? True, § 764 permits suits under foreign law when "a right of action is granted by the law of any foreign State." Since U.S. law, not South Korean law (or French law or Brazilian law), applies to this case, we are at a loss to understand how "a

right of action is granted by the law of " South Korea or any other foreign country. If South Korean law does not apply to a suit, it can hardly grant rights to the parties. Once the choice-of-law determination is in favor of U.S. law, only U.S. law can grant plaintiffs any sort of right of action.

It is fair to ask what function § 764 serves if not the one plaintiffs imagine. If, as we have decided, § 764 cannot be used to inject foreign law into a case controlled by U.S. law, one might suppose it has no purpose. When foreign law governs a case, the court would not consider the various provisions of the Death on the High Seas Act. But § 764 is not without significance.

The provision originated as an amendment recommended by the Senate Committee on the Judiciary. The Committee's report took the position (no longer current) that Congress had no power to create a right of action allowing the recovery of damages against foreigners or foreign vessels for deaths occurring on the high seas. S. REP. No. 66-216, at 4 (1919). The report also recognized that American courts permitted suits concerning foreign vessels to proceed under the law of the vessel's home country. *Id.* at 4-5. For example, the claims in *La Bourgogne*, 210 U.S. 95 (1908), were against a French vessel and its owners for deaths occurring on the high seas. The Supreme Court held that while U.S. law at that time did not recognize a wrongful death cause of action, wrongful death damages were available under French law in a proceeding in a U.S. court. *Id.* at 138-40. Section 764 was the legislative response to decisions permitting the owners of such foreign vessels to take advantage of U.S. statutes limiting their liability, *see, e.g., Oceanic Steam*

Navigation Co. v. Mellor, 233 U.S. 718, 731 (1914) ("*The Titanic*").[7] The Committee report explained § 764 this way: "[A]s the Supreme Court has held that the limited liability statute of the United States applies to foreign ships seeking such limitation of liability in our courts, the committee recommends that the bill be amended by the insertion of [§ 764]." S. REP. No. 66-216, at 5.

It was immediately recognized that § 764 was "superfluous" insofar as it provided that U.S. courts would hear suits under foreign law in cases involving foreign vessels. Hughes, *supra*, 31 YALE L.J. at 118, 122; *see also* Calvert Magruder & Marshall Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 423-24 (1926). As the Senate Committee realized, that was already the practice. The real force of § 764 was its barring foreign vessel owners from taking advantage of American limitation of liability laws.

Another function of § 764, not discussed in the legislative history, is to require foreign law actions for wrongful deaths on the high seas to be brought in admiralty, at least if the plaintiffs wish to prevent the defendants from limiting their liability. *See The Silverpalm*, 79 F.2d 598, 600 (9th Cir. 1935); *Bergeron*, 188 F. Supp. at 597-98; *Iafrate*, 106 F. Supp. at 621-22; *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941). *But see Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925).

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[7] Under Rev. Stat. § 4283 (1878) (current version at 46 U.S.C. App. § 183), when a loss or injury occurred "without the privity, or knowledge" of a vessel owner, the owner could limit its liability to the value of its interest in the vessel and "her freight then pending."

Section 764 also made it explicit that American courts would continue to hear these suits under foreign law. While the courts' authority to do so did not depend on § 764, without § 764 the Death on the High Seas Act would have been open to the judicial interpretation that it was a congressional attempt – albeit an illegitimate one in the eyes of the Senate Committee – to impose a new American law of wrongful death on all suits brought in U.S. courts, including those against foreign defendants. Some maritime statutes of the period explicitly applied to foreigners and their vessels. *See, e.g.*, Act of Mar. 4, 1915, ch. 153, § 4, 38 Stat. 1164, 1165. Others, like the limitation of liability statute (which at that time applied to "the owner of any vessel," Rev. Stat. § 4283), were less clear on the point, but the courts interpreted them to apply to foreigners as well as Americans, *see, e.g., The Titanic*, 233 U.S. at 731. Thus, § 764 made it certain that the substantive provisions of the Death on the High Seas Act were not to displace foreign law in those cases in which foreign law already applied.

We therefore find no reason for concluding that § 764 requires the abandonment of normal choice-of-law principles, as plaintiffs suggest, allowing them to combine the most favorable elements of U.S. law, South Korean law, and perhaps also any other nation's law. Section 764 and foreign law play no role once a court determines that U.S. law governs an action.

Affirmed.

United States Court of Appeals
For The District of Columbia Circuit

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Wald and Randolph, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' petition for rehearing filed August 7, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For The District of Columbia Circuit

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Relevant Provisions of the Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018.

Article 24

1. In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020.

Article 25(1)

1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. 49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of Action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the territories or dependencies of the United States', the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in

an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

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(2)

No. 97-704

FILED

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PHILOMENA DOOLEY, ET AL.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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3888

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether, in light of *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the pecuniary damage standard of the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, may be supplemented with nonpecuniary damages for pre-death pain and suffering on the basis of general maritime law?

RULE 29.6 LISTING

Respondent KOREAN AIR LINES CO., LTD. ("KAL") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-704

PHILOMENA DOOLEY, ET AL.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Petition for Writ of Certiorari ("Petition") does not make reference to the following relevant decisions of the district court below: *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) and *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-2793 *et al.* (D.D.C. Apr. 8, 1993) (not officially reported). These decisions are reproduced in the Appendix hereto at RA 1a and RA 14a, respectively. References preceded by "RA" refer to pages in the Appendix hereto. References preceded by "A" refer to pages in the Appendix to the Petition.

JURISDICTION

Respondent KOREAN AIR LINES CO., LTD. ("KAL") agrees with the jurisdictional statement set forth in the Petition, except that jurisdiction in the district court also existed pursuant to 28 U.S.C. § 1333, Original Admiralty and Maritime Jurisdiction.

STATUTORY AND TREATY PROVISIONS INVOLVED

These actions are governed exclusively by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* and the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 40105) ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix to the Petition at A 21a-23a.

STATEMENT OF THE CASE

KAL supplements the statement of the case in the Petition to set forth fully the disposition of the cases in the district court and in the Court of Appeals below.

A. Nature of the Case

The case at this stage involves only the legal question whether nonpecuniary damages for pre-death pain and suffering are recoverable for the deaths of five passengers on KAL flight KE007, who were killed when the aircraft was shot down by Soviet military aircraft on September 1, 1983. The deaths of the decedents occurred on the high seas, within the meaning of DOHSA, during the course of international transportation by air, within the meaning of the Warsaw Convention. The Petitioners are the personal representatives of the estates of the deceased passengers, who seek pecuniary

and nonpecuniary damages individually and on behalf of the estates and various surviving relatives of the decedents.

B. Disposition Below

1. The Pre-*Zicherman* Rulings of the District Court

In 1993, following the conclusion of the multidistrict liability proceedings[1], KAL moved in these and other cases, pending in the district court and awaiting damage trials, for a determination, *inter alia*, that the types of recoverable damages are governed exclusively by DOHSA and that Petitioners, therefore, were not entitled to recover any nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. 46 U.S.C. App. § 762 (A 22a). By Memorandum Opinion and Order, filed April 8, 1993, the district court denied KAL's pre-trial motion. *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-2793 *et al.* (D.D.C. Apr. 8, 1993) (RA 14a). The district court found that, although both DOHSA and the Warsaw Convention apply to these actions, DOHSA was not the exclusive remedy as to recoverable damages. *Id.* at RA 15a. The district court allowed Petitioners to pursue the recovery of nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. *Id.*[2] The

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[1] The liability of KAL was determined in the context of multidistrict litigation proceedings in the district court below. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

[2] The district court, in four other actions that were tried, subsequently held that nonpecuniary damages for survivor's grief are not recoverable under the Warsaw Convention as a matter of law. *See Forman v. Korean Air Lines*, No. 83-3578 (D.D.C. June 6, 1995) (Memorandum Opinion and Order), *aff'd and rev'd in part*, 84 F.3d 446 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 582 (1996); *Oldham v. Korean Air Lines*, 1994 WL 725277 (D.D.C. Oct. 11, 1994), *aff'd and rev'd in part*, ___ F.3d ___, 1997 WL 582898 (D.C. Cir. Sept. 23, 1997); *Ocampo v. Korean Air Lines*, 1994 WL 731569 (D.D.C. Sept. 16, 1994), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, ___ F.3d ___, 1997 WL 582898 (D.C. Cir. Sept. 23, 1997); *Maikovich v. Korean Air Lines*, No. 83-3792 (D.D.C. Nov. 14, 1994) (Memorandum Opinion and

district court based its decision on the notion that these types of nonpecuniary damages are recoverable under Article 17 of the Warsaw Convention as "damage sustained." *Id.*

2. The Court's Decision in *Zicherman v. Korean Air Lines*

While these cases were pending and awaiting damage trials in the district court, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996)[3] and rejected the notion that any type of damages are recoverable directly under the Warsaw Convention as "damage sustained." *Zicherman*, 116 S. Ct. at 632-636. The Court explained that "damage sustained" in Article 17 of the Convention refers to "legally cognizable harm" and that courts are to determine "legally cognizable harm" *only* by reference to the applicable domestic law under the forum's choice-of-law rules, pursuant to Article 24 of the Convention. *Id.* In *Zicherman*, as in these cases, the applicable domestic law is DOHSA. *Id.* at 635-36.

The Court in *Zicherman* also rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition" absent the Convention. *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.*

Order), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, ___ F.3d ___, 1997 WL 582898 (D.C. Cir. Sept. 23, 1997).

[3] The damage trials had been stayed by the district court pending the Court's decision in *Zicherman*.

The governing law in *Zicherman* was DOHSA, which permits recovery of pecuniary damages only. *Id.*; 46 U.S.C. App. § 762 (A 22a). The Court stated that, where DOHSA applies, neither state law nor general maritime law can provide a basis for the recovery of nonpecuniary damages for loss of society (the only question before the Court). *Id.* at 636. The Court, therefore, concluded that nonpecuniary damages for loss of society were unavailable. *Id.* at 636-37; 46 U.S.C. App. § 762 (A 22a). The Court, however, noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," as the question was not before the Court. *Id.* at 636, n.4.

3. The Post-*Zicherman* Decision of the District Court

Following the Court's decision in *Zicherman*, KAL moved the district court to dismiss all claims for nonpecuniary damages in those cases still awaiting damage trials. KAL argued that the holding and rationale of the Court in *Zicherman* precludes the recovery of all nonpecuniary damages, including pre-death pain and suffering damages. Petitioners argued that pre-death pain and suffering damages were recoverable pursuant to a general maritime law survival action or under Korean law, pursuant to § 764 of DOHSA.[4]

The district court granted KAL's motion and dismissed all claims for nonpecuniary damages, finding that in light of *Zicherman*, nonpecuniary damages no longer are recoverable in these cases. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) (RA 1a). The district court, following the teaching of *Zicherman*, conducted a choice of law analysis and concluded that DOHSA supplies the applicable substantive United States damage law. *Id.* at 12-14 (RA 4a-7a). Next, the district court concluded that the rationale of *Zicherman* precludes the award of nonpecuniary

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[4] Petitioners also argued that nonpecuniary damages for survivor's grief were recoverable pursuant to Korean law.

damages for pre-death pain and suffering. *Id.* at 14 (RA 7a-10a). The district court held in this regard:

> [I]t appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles. . . . Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

935 F. Supp. at 15 (RA 10a).[5]

Petitioners appealed this decision, pursuant to 28 U.S.C. § 1292(b), to the Court of Appeals.

C. The Decision of the Court of Appeals

On July 11, 1997, the Court of Appeals affirmed the decision of the district court. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 117 F.3d 1477 (D.C. Cir. 1997) (A 1a). The Court of Appeals, following the decisions in *Zicherman* and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), held that nonpecuniary damages for pre-death pain and suffering may not be recovered for a death on the high seas. 117 F.3d at 1481-83 (A 8a-14a). The Court of Appeals rejected Petitioners' reliance on several pre-*Zicherman* decisions, allowing DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering under general maritime law and adopted the post-*Zicherman* conclusion of the Ninth Circuit in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 549-51 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996). The Court below reasoned:

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[5] The district court found Petitioners' argument that nonpecuniary damages for pre-death pain and suffering are recoverable under Korean law to be "irrelevant", because the court had determined that United States law governed the question of recoverable damage. *Id.* at 14, n.2 (RA 8a).

> Three courts of appeals have dealt with the availability of a general maritime law survival action for deaths on the high seas. The First and Fifth Circuits have permitted general maritime law survival actions in cases in which the Death on the High Seas Act also applies. *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Barbe*, 507 F.2d at 799-800. The Ninth Circuit reached the opposite conclusion. *See Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir. 1996). We believe the Ninth Circuit got it right.
>
> Assume general maritime law provides a survival action in some cases (we do not decide whether it does). Still, the effect of the Supreme Court's decision in *Higginbotham* must be evaluated. Nonpecuniary damages may be recovered under general maritime law, but not, the Court held, when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages. "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Higginbotham*, 436 U.S. at 623. 98 S. Ct. at 2014. "The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Id.* at 625, 98 S. Ct. at 2015. *Moragne* developed general maritime law in a space Congress had not occupied. But "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

> *Higginbotham* thus instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

117 F.3d at 1481 (A 8a-9a) (footnoted omitted).[6]

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT WHICH EXISTS IN THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS

Respondent KAL has no reasonable basis for opposing certiorari because, following the filing of the Petition, the Court of Appeals for the Eleventh Circuit rendered a decision which is in direct conflict with the decisions of the Court of Appeals below and the Ninth Circuit in *Saavedra* as to whether DOHSA may be supplemented with nonpecuniary damages for pre-death pain and suffering under general maritime law. *See Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1371, 1381-84 (11th Cir. 1997).

The question presented for review is identical to the question previously presented for review in the Petition for Writ of Certiorari filed in *Saavedra v. Korean Air Lines*, No. 96-623, which the Court denied on December 9, 1996. *See Saavedra v. Korean Air Lines*, 117 S. Ct. 584 (1996). Denial of the Petition in *Saavedra* was appropriate because, at that time, the post-*Zicherman* courts that had addressed the

[6] The Court of Appeals also rejected Petitioners' reliance on the law of South Korea as a basis for the recovery of pre-death pain and suffering damages. 117 F.3d at 1483-85 (A 14a-18a).

recoverability of nonpecuniary pre-death pain and suffering damages, save one[7], had concluded that the rationale of *Zicherman* foreclosed recovery of *all* nonpecuniary damages, including pre-death pain and suffering damages, in an action governed by DOHSA. *See Saavedra*, 93 F.3d at 550-54; *see also Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir.), *amended on reh'g*, 96 F.3d 151, 156-58 (6th Cir. 1996) (Batchelder, J., dissenting), *cert. denied*, 117 S. Ct. 770 (1997). As explained by the Ninth Circuit in *Saavedra*:

> [T]he Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims.
>
> * * *
>
> The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction.

Saavedra, 93 F.3d at 550-51, 554.

The Court of Appeals below undertook an extensive analysis of Supreme Court precedent and DOHSA and rejected the pre-*Zicherman* decisions[8] allowing DOHSA to be supplemented by a general maritime law survival remedy. 117 F.3d at 1481-83 (A 4a-14a). The Court of Appeals found that

[7] *See Beirn v. Korean Air Lines*, 25 Avi. Cas. (CCH) 17,755 (E.D.N.Y. 1996).

[8] *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974).

the Ninth Circuit in *Saavedra* "got it right" and concluded that nonpecuniary damages may not be recovered under general maritime law when DOHSA applies. *Id.* In rejecting Petitioners' argument that DOHSA is a "wrongful death" statute and has no bearing on survival remedies[9], the Court below stated:

> Calling [DOHSA] a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Id. at 1483 (A 13a).

On October 24, 1997, following the filing of the Petition herein, the Court of Appeals for the Eleventh Circuit in *Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1371 (11th Cir. 1997), recognized a general maritime law survival remedy for a death on the high seas and allowed the recovery of nonpecuniary pre-death pain and suffering damages to supplement DOHSA. 125 F.3d at 1381-84. In so doing, the Court of Appeals in *Gray* specifically rejected and disagreed with the decisions of the Court below and the Ninth Circuit in *Saavedra*. 125 F.3d at 1381, 1383. Rather than follow the path laid out by the Court in *Zicherman* and *Higginbotham*, the Court of Appeals in *Gray* embarked upon the incorrect path charted by the pre-*Zicherman* courts in *Azzopardi* and *Barbe*. As matters now stand, therefore, the D.C. and the Ninth Circuits do *not* allow DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering under any theory, but the Eleventh Circuit now allows DOHSA to be supplemented with such nonpecuniary damages.[10] There is no

[9] This argument forms the basis of the pre-*Zicherman* decisions allowing DOHSA to be supplemented with nonpecuniary pre-death pain and suffering damages under general maritime law. *Azzopardi*, 742 F.2d at 893-94; *Barbe*, 507 F.2d at 799-800.

[10] The Courts of Appeals for the Fifth (*Azzopardi*) and First (*Barbe*) Circuits have not addressed the issue post-*Zicherman*. Similarly, the

rational or logical manner in which to reconcile the conflicting results between the decision of the Court below and the decision in *Gray*.

The question whether the DOHSA remedy may be supplemented with nonpecuniary pre-death pain and suffering damages is important and worthy of review by the Court. Review at this time will provide valuable and needed guidance to the lower courts which now face this important question of federal maritime law in each action governed by DOHSA. A decision by the Court will be relevant not only to this litigation, but to all actions governed by DOHSA, whether arising from an aviation disaster (*e.g.*, TWA flight 800) or from a private aircraft, helicopter, cruise ship, swimming, boating or jet ski accident occurring on the high seas and resulting in the death of a person.

KAL respectfully submits that the decision of the Court of Appeals below is correct in all respects. However, certiorari should be granted to resolve the conflict which now exists in the Courts of Appeals, as well as in the district courts[11], as to the recoverability of nonpecuniary damages for pre-death pain and suffering in an action governed by DOHSA.

Court of Appeals for the Third Circuit, which held that the DOHSA remedy may be supplemented by pre-death pain and suffering damages under a state survival statute, has not addressed the issue post-*Zicherman*. *See Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388-92 (3d Cir. 1971).

[11] Compare *Beirn v. Korean Air Lines*, 25 Avi. Cas. (CCH) 17,755, 17,761 (E.D.N.Y. 1996) (recovery allowed), with *Tandon v. United Air Lines*, 968 F. Supp. 940, 942 (S.D.N.Y. 1997) (recovery disallowed).

CONCLUSION

The Petition for Writ Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Dated: November 20, 1997

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
MISC. NO. 83-0345

83-2793 DOOLEY
83-2940 SAAVEDRA
84-0331 BOYAR
84-0332 BOYAR
84-1710 CUNNINGHAM

Filed June 4, 1996

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983,

MEMORANDUM OPINION AND ORDER

On September 1, 1983, Korean Air Lines ("KAL") flight KE007 was shot down by a Soviet military aircraft, after it had veered off its course into Soviet airspace, killing all 269 passengers. The liability of KAL for those deaths was determined in a multidistrict litigation action in the District Court for the District of Columbia.[1] In that action, a jury found that KAL's "willful misconduct" proximately caused the passen-

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[1] An extensive discussion of the facts of this case may be found in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

gers deaths, thus allowing recovery beyond the Warsaw Convention's $75,000 cap on damages. *See* Warsaw Convention, Art. 25, 49 Stat. 3020; Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, *reprinted in note following* 49 U.S.C. App. § 1502 (1988 ed.). Following appeals of this action, the individual compensatory damages trials were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts. Several actions regarding the recoverable compensatory damages still remain before this Court.

Presently before the Court is Defendant KAL's Motion to Dismiss Claims for Nonpecuniary Damages. Defendant argues that damages for loss of society, survivor's mental grief, and for predeath pain and suffering of a decedent are not recoverable. The parties agree that Plaintiffs' claims for loss of society damages must be eliminated in light of *Zicherman v. Korean Air Lines Co., Ltd.*, ___ U.S. ___, 116 S. Ct. 629 (1996). KAL's Motion raises two issues: (1) whether claims for mental grief, recoverable under Korean law, may be pursued in this Court after a choice of law analysis, and (2) whether survival damages for pre-death pain and suffering may supplement the wrongful death damages available under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*

I. Discussion

Article 17 of the Warsaw Convention makes an airline liable for "damages sustained" in the event of the death of a passenger, it provides:

> The carrier shall be liable for *damages sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 301 (emphasis added).

Until the Supreme Court's decision in *Zicherman*, ___ U.S. ___, 116 S. Ct. at 629, various courts struggled with the question of which "damages" are available under the Warsaw Convention. *See, e.g., In re Korean Air Lines*, 932 F.2d. at 1475 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2nd Cir.), *cert. denied, sub nom. Rein v. Pan American World Airways, Inc.*, 502 U.S. 920 (1991). With *Zicherman* the Court put some of this confusion to rest, holding that "damage" means only "legally cognizable harm" and that "Article 17 leaves it to the adjudicating courts to specify what harm is cognizable." 116 S. Ct. at 633. The Court found support for its interpretation of "damage" in Article 17 through the express limitations of Article 24 of the Warsaw Convention which provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.*

49 Stat. 3020 (emphasis added). Under the Court's interpretation of Article 24(2) when an "action is brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for." *Zicherman*, 116 S Ct. at 634. The Court concluded that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice of law rules." *Id.* at 637.

A. Choice of Law

Having concluded that compensable harm is determined by domestic law, the *Zicherman* Court explained that its next logical step would be to determine which sovereign's domestic law applied. The Court did not conduct a choice of law analysis because the parties had previously agreed that the issue of compensable harm was governed by United States law. The Court held, however, that where United States law governed, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* (1988), supplied the substantive law of damages for an aircraft crash on the high sea. *Id.* at 636.

This Court has not been spared the choice of law question regarding which sovereign's domestic law governs compensable harm. Jurisdiction in these actions is premised on the federal treaty, the Warsaw Convention, 28 U.S.C. § 1331, admiralty, 28 U.S.C. § 1333, and in part on diversity. Here the parties are diverse because the Plaintiffs are citizens of the United States and the Defendant is a foreign nation. In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941), the Court held that a federal court sitting in diversity must apply the choice of law principles of the state in which it sits. Because jurisdiction in these cases is based only partly on diversity, application of the District of Columbia's choice of law rules is not necessarily required, especially in light of a potential conflict between the District of Columbia and a federal policy. In *O'Melveny & Meyers v. F.D.I.C.*, ___ U.S. ___, 114 S. Ct 2048, 2055 (1994), the Court explained that a special federal rule is justified in "limited situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' "

The Court recognizes that there is "no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), but is guided by the Court of Appeals for the Sixth Circuit's determination that the Warsaw Convention's, "concrete federal policy of uniformity and certainty" would be undermined

if a state choice of law rule is applied, and therefore a special federal rule is appropriate to govern this choice of law question. *Bickel v. Bowden*, __ F.3d __, 1996 WL 203349 at *3 (6th Cir. 1996). In discussing the important federal policy of uniformity and certainty embodied by the Warsaw Convention, the Court of Appeals for the Second Circuit explained:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. . . . Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state law causes of action could fail to frustrate these purposes.

In re Air disaster at Lockerbie, Scotland, 928 F.2d. 1267, 1275 (2nd Cir. 1991). Application of the United States' various choice of law rules could have a deleterious effect on consistent determinations of the applicable rules regarding damages under the Warsaw Convention. Thus, this Court is convinced that a federal choice of law rule is necessary here.

In the absence of any established body of federal choice of law rules, courts have looked to the Restatement (Second) of Conflict of Laws (1969) (hereinafter "Restatements") as "a source of general choice of law principles and an appropriate starting point for applying federal common law in this area." *See Bickel*, at * 3; *Harris v. Polskie Line Lotnicze*, 820 F.2d. 1000, 1003 (9th Cir. 1987). Section 175 of the Restatements provides a choice of law rule (known as the *lex loci delicti* rule) for a wrongful death action and creates a presumption in favor of law of the location where the injury occurred:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatements, § 175. The *lex loci delicti* rule in § 175 is difficult to apply in these cases because "it is not clear whether KE007 was shot down in Soviet airspace, over Japanese territory or in international waters." *In re Korean Air Lines*, 932 F.2d. at 1497 (Mikva, J. dissenting). Additionally, the Sixth Circuit recognized that assuming that the former U.S.S.R. was the place the injury occurred, "the U.S.S.R. is ceased to exist . . . [and therefore] no longer has a judicially cognizable interest in these matters." Furthermore, the parties have limited their choice of law arguments to whether the United States or the law of Korea applies, and the Court finds that these countries should be the focus of the choice of law determination.

"In lieu of the *lex loci* rule, § 6 of the Restatements endorses a "most significant relationship" or "center of gravity" test, which requires consideration of several factors to determine which state has a more significant interest in having their law applied. "The governmental interest approach seeks to identify which jurisdictions may have an actual interest in having their substantive law apply to a particular controversy. . . ." *See In re Korean Air Lines*, 932 F.2d at 1497 (Mikva, J. dissenting). The relevant factors of § 6 include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and

> (g) ease in the determination and application of the law to be applied.

When considering the contacts of the two countries the Court notes that South Korea is KAL's place of incorporation, its principal place of business, and the place where its crews are trained. On the other hand, the United States is the place of embarkation for many of the passengers, where the flight originated, and where all of the tickets were purchased.

Though both the United States and South Korea have significant contacts, consideration of the factors in § 6 convinces this Court that the United States law should govern these cases. The Court agrees with the analysis of the Sixth Circuit that "application of United States law supports 'ease in the determination and application of the law applied' " and " 'the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,' " weigh heavily in the favor of this United States." *Bickel*, at * 4. Indeed, "certainty, predictability, and uniformity of result" would be supported because the Supreme Court has already applied the United States law when determining compensatory damages. *See Zicherman*, 116 S. Ct. at 629; *In re Korean Air*, 932 F.2d at 1475.

Furthermore, this Court agrees that because "these actions arise under the Warsaw Convention, neither nation can legitimately claim to offer greater protection of the 'the basic policies underlying the particular field of law,' or 'the needs of the interstate and international system.' " *Bickel*, at *4. Accordingly, the Court finds that the United States law is the most appropriate when determining the available compensatory damages for these actions.

B. Loss of Society and Survivor's Grief

In light of the Supreme Court's decision in *Zicherman*, that DOHSA, supplies the substantive United States law regarding damages and that loss of society damages are not available under DOHSA this Court concludes that survivor's grief dam-

ages are also unavailable.[2] The *Zicherman* Court held that under § 762 of DOHSA recovery in a suit for death under § 761 "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefits the suit is brought." 46 U.S.C. App. § 762. Following the dictates of DOHSA, the Court concluded that loss-of-society damages, since they are not pecuniary, may not be recovered.

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[2] Because this Court has determined that United States law governs the damages issues in this action and that DOHSA applies, Plaintiffs' argument that mental grief damages are available because Korean law permits claims for such damages is irrelevant.

Additionally, the Court rejects Plaintiffs' assertion that sections 1 and 4 of DOHSA are cumulative. 46 U.S.C. App. §§ 761, 764. Following Plaintiffs' interpretation of DOHSA, they are entitled to recover all pecuniary damages allowed by virtue of § 1 of DOHSA and in addition any damages allowed by Korean law pursuant to § 4. The Court finds that sections 1 and 4 are mutually exclusive rather than cumulative. *See In re Air Crash Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij N.V.*, 188 F. Supp. 594 (S.D.N.Y. 1960). Section 1 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Colombia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S C. App. § 761. Section 4 provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States . . . .

42 U.S C. App. § 764. The Court finds that while § 4 permits a cause of action based upon foreign law to be brought in admiralty in federal court, it only applies when foreign law applies pursuant to a choice of law analysis. In this case, it has been determined that United States law governs therefore the Court finds that § 4 is inapplicable and that only § 1 governs damages.

Damages for a survivor's grief are a non-pecuniary form of damages which represents compensation for an emotional response to wrongful death. *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). The Supreme Court has previously recognized that although federal maritime law permits dependent survivors to recover loss of society damages, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978). Having concluded in *Zicherman* that DOHSA precludes recovery for the nonpecuniary damages such as loss of society, survivor's grief should be similarly unavailable. The court agrees with the Sixth Circuit that there is no "distinction of which the *Zicherman* Court would have approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not." *Bickel*, at *5.

C. Survival Actions for Pre-Death Pain and Suffering

Plaintiffs also argue that DOHSA limits recovery for only wrongful death claims and does not preclude additional recovery for pre-death pain and suffering because it is a survival claim.[3] There is no dispute that recovery for the decedents' alleged pre-death pain and suffering is not recoverable under DOHSA.[4] Rather, Plaintiffs argue that their survival claims are distinct from wrongful death claims and are available under general maritime law and can supplement the damages recoverable under DOHSA.

---

[3] "A wrongful death cause of action belongs to the decedent's dependents. . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the deceased from the action causing death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622 (3d Cir. 1994); *aff'd* __ U.S. __, 116 S. Ct. 619 (1996).

[4] DOHSA is a wrongful death statute that restricts recoverable to the "pecuniary loss sustained." 46 U.S.C. App. § 762.

This Court disagrees. Although, other courts have allowed a pain and suffering claim to supplement the awards recoverable under DOHSA, it appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles.[5] The Court explained where DOHSA applies neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Zicherman*, 116 S. Ct. at 636 (citations omitted): *See also Higginbotham*, 436 U.S. at 618 (federal maritime law is not available to supplement DOHSA because with DOHSA congress specifically spoke to the issue of damages and provided damages only for pecuniary losses, the Court may not provide supplementary damages beyond that authorized by Congress). Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that the non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

II. Conclusion

For the foregoing reasons, it is by the Court this 4th day of June, 1996,

ORDERED, that Defendant's Motion to Dismiss All Claims for Non-Pecuniary Damages be and hereby is GRANTED; and it is

FURTHER ORDERED, that Plaintiff's claims for loss of society damages, mental anguish and grief, and pre-death pain and suffering be and hereby are DISMISSED with prejudice.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

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5 In cases decided prior to *Zicherman*, several courts used general maritime survival principles to supplement the pecuniary damages available under DOHSA, with pain and suffering damages. *See e.g., Barbe v. Drummond*, 507 F.2d 795, 800 (5th Cir 1974); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992).

ORDER

Upon consideration of the Joint Motion for an Order Amending Order of June 4, 1996 to Include Statutory Language From 28 U.S.C. 1292(b) to Certify the Court's Order of June 4, 1996 for an Interlocutory Appeal and a Joint Motion for a Stay, it is by the Court this 1st day of July, 1996,

ORDERED, that the above-captioned actions be and hereby are STAYED until further Order of the Court; and it is

FURTHER ORDERED, that the Joint Motion for certification of this Court's Order of June 4, 1996 to the Court of Appeal for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), be and hereby is GRANTED; and it is

FURTHER ORDERED, that this Court's Order of June 4, 1996 be and hereby is amended to state:

Certification for Interlocutory Appeal

Generally, appellate review of a trial court's decision is only appropriate upon an appeal from a final judgement in the trial court, that is, only after all the issues involved in a particular lawsuit have been finally determined. See F. James and G. Hazard, Civil Procedure § 12.4 at 657 (1985). However, in 1958 Congress created a statutory exception to the final judgment rule, codified at 28 U.S.C. § 1292(b). Section 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

Thus, an interlocutory appeal can be properly certified only where the district court and the appellate court agree that (1) an order involves a "controlling question of law"; (2) this controlling question of law is one upon which "there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The within action are governed by the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Star. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502. The liability of Korean air for the death of all passengers on Korean Air Lines Flight KE007 has previously been established. See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C.Cir.), cert. denied 502 U.S. 994 (1991). The actions remaining in this Court assert recovery for damages and are postured following the Supreme Court's decision in Zicherman v. Korean Air Lines Co., Ltd., ___ U.S. ___, 116 S.Ct. 629 (1996), which held that the wrongful death cause of action is covered by the Death on the High Seas Act, 46 U.S.C.App. § 764 et seq. ("DOHSA"). Specifically, Plaintiffs claim a right to recover damages for mental anguish and grief pursuant to 28 U.S.C. § 764 under Korean law and that there is a general maritime survival action separate and distinct from the wrongful death action under DOHSA which may co-exist with the wrongful death action.

The Court has granted Korean Air Lines' Motion to Dismiss all claims for nonpecuniary damages holding that mental anguish and grief damages may not be recovered and that a general maritime survival action may not supplement wrongful death damages under DOHSA. The pending issues have never been addressed by the United States Court of Appeals for the District of Columbia and were not addressed in Zicherman, ___ U.S. ___, 116 S.Ct. at 629.

The parties are of the opinion that the recoverable damages issues involve controlling questions of law which are of significant importance to the remaining damages trials currently pending in this Court and that there are substantial grounds for differences of opinion. The parties are further of the opinion that an immediate appeal from this Order will materially advance the ultimate termination of the remaining litigation.

This Court agrees. During the many years that this litigation has been in this Court and in the other district courts and circuit courts across the United States questions regarding recoverable damages have repeatedly confounded the courts. Complicating the determination of available damages are circuit splits and the interplay between the Warsaw Convention, DOHSA, and general maritime law. With the Supreme Court's opinion in Zicherman, a major step was taken towards resolving the difficult question of available damages under the Warsaw Convention. Guidance from the Court of Appeals for the District of Columbia Circuit regarding: (1) the availability of mental anguish and grief damages; and (2) the availability a survival action for pain and suffering damages in light in Zicherman, will hopefully assist in terminating these action once in for all. Therefore the Court certifies this Order dismissing Plaintiffs' claims for nonpecuniary damages for an immediate interlocutory appeal.

It is FURTHER ORDERED, that above-captioned cases be and hereby are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because they involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
CIVIL ACTION NOS.
83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788

Filed April 8, 1993

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1993,

MEMORANDUM OPINION

Before the Court are several pretrial motions filed by the defendant and plaintiffs in these case. They include: (1) KAL's motion requesting that Plaintiffs' damages be limited to those recoverable under the Death On the High Seas Act ("DOSHA"); (2) KAL's motion for partial summary judgment for decedents' Pre-death Pain and Suffering Claims; (3) KAL's Motion in Limine to Exclude the testimony of Experts on Pre-death Pain and Suffering; (4) KAL's Motion in Limine to Exclude any and all reference and evidence of KAL's negligence and wrongful misconduct; and (5) Plaintiffs' Motion for Prejudgment Interest.

A. Applicable Law

Defendant argues that the determination of damages in these cases should be governed exclusively by the Death on the High Seas Act (DOSHA), 46 U.S.C. § 761 *et seq*. Plaintiffs contend that since these claims are brought pursuant to the Warsaw Convention, DOSHA cannot limit the damages recoverable. This Court agrees.

As this Court stated previously, DOSHA is not the exclusive remedy in these cases. The Court has jurisdiction based concurrently on 28 U.S.C. § 1331 (Federal Question, i.e. the Warsaw Convention) and on DOSHA. To hold that the conflicting portions of DOSHA supersede those of the Convention would "render the Convention meaningless insofar as it relates to aircraft accidents which occur on the high seas more that a marine league from the shore." *See* In re Korean Air Lines Disaster of September 1, 1993 (March ___, 1992) slip. op at 7.

The Warsaw Convention allows for the recovery of all "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. The Court of Appeals for the District of Columbia has held that "damages sustained" refers to actual harm experienced. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485 (D.D.C. 1991). To the extent that this is contrary to the provision of DOSHA, the Warsaw Convention shall prevail. Accordingly, defendant's Motion is DENIED.

B. Motions Concerning Pre-death Pain and Suffering

Defendant moves for partial summary judgment of decedents' pre-death pain and suffering claims and requests that the court exclude the experts who will testify about the claims. KAL argues that the claim and all testimony in support of the claim is based on speculation and conjecture. Plaintiffs argue that there is sufficient evidence to produce a material question of fact that makes summary judgment inappropriate. Further, they contend that the experts' opinions are

based on provable facts and will assist there trier of fact in understanding the evidence or determining a fact in issue.

The Court concludes that summary judgment is not appropriate in this instance. A question of fact exists as to what took place on board the plane after the missile strike. The resolution of this matter is material to the pre-death pain and suffering claims. Therefore, the motion for partial summary judgment is DENIED. The admission of the expert testimony is an evidentiary matter that can only be properly determined during the course of the trial. To the extend that Plaintiffs can provide the evidence necessary to sustain these claims, it will be heard by the jury.

C. Reference to KAL's "Willful Misconduct"

Plaintiffs will not be allowed to make mention of KAL's negligence or "willful misconduct" during voir dire or the presentation of evidence in this case. The liability of the defendant is not at issue in these proceedings and any mention of the jury's findings would be unduly prejudicial to the defendant. However, the jury must be told how the litigation got to this point. Therefore, the parties are to stipulate to a statement concerning the events that led to the crash that may be used in the openings and closings in these cases. This statement should be submitted to the Court no later than the close of business on April 19, 1993.

D. Prejudgment Interest

Plaintiffs request that the Court award them prejudgment interest at the prime rate from the date of the incident. The defendant argues that Plaintiffs are not entitled to such interest due to their vigorous pursuit of punitive damages. KAL contends that if the Court determines that prejudgment interest is appropriate, it should be award from the date the Supreme Court denied certiorari and at the 52-week Treasury Bill rate.

The Court finds no merit in KAL's argument to preclude the awarding of prejudgment interest. Accordingly, Plaintiffs will receive prejudgment interest on their damage awards. However, a Determination of the rate of interest will be made at a later date.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

DATE: April 8, 1993

(3)

No. 97-704

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.

Petitioners,

v.

KOREAN AIR LINES CO., LTD.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 27, 1997
Certiorari Granted January 9, 1998

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DATE	PROCEEDINGS
1983	
Mar 10	MOTION by deft. KAL re: the applicable law to the determination of damages. (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788). (md)
Mar 10	MOTION by deft. KAL for partial summary judgment dismissing claims for pre-death pain and suffering and to preclude expert testimony (pre-death pain and suffering motion). (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788). (md)
	* * *
1993	
Mar 24	MEMORANDUM by pltfs in opposition to KAL's motion regarding the applicable law to the determination of damages; Exhibits (5) (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788). (ks)
	* * *

Apr 2 REPLY BRIEF by deft KAL in support of its motion for partial summary judgment, and to preclude expert testimony. (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788, 85-3444). (ks)

* * *

Apr 2 REPLY MEMORANDUM by KAL in support of its motion regarding the applicable Law to the determination of damages. (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788, 85-3444). (ks)

Apr 8 MEMORANDUM OPINION. (N) (Judge Robinson) (ks)

Apr 8 ORDER that KAL's motion for partial summary judgment, motion in in limine to preclude expert testimony on pre-death pain and suffering, and motion regarding the applicable law are denied; and that KAL's motion in limine to exclude reference to and evidence of KAL's negligence and willful misconduct is granted; that plaintiff's motion for prejudgment interest is granted, with the rate of interest to be determined at a later date. (N) (Judge Robinson) (ks)

Dec 28 MOTION by deft. for a stay. (ks)

Dec 31 MOTION by deft. to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to Rule 60(b) of the FRCP; Exhibits (7) (ks)

Jan 5 OPPOSITION by pltf. to deft's motion for stay; exhibits (2). (ks)

Jan 14 REPLY by deft. in support of its motion for a stay. (ks)

Jan 14 STIPULATION filed 1/10/94 extending time until 2/15/94 to oppose KAL's motion to vacate and set aside the final judgment. (N) HOGAN, J. (ks)

* * *

Feb 2 ORDER granting def's motion for stay; and that all proceedings in this Court in this case are Stayed, pending disposition of deft's motion to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to FRCP 60(b); and that parties shall appear on said motion 4/22/94 at 10:00 a.m. (N) ROBINSON, J. (ks)

Mar 8 REPLY by Korean Air Lines in support of their motion to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to FRCP Rule 60(b); Exhibits (3) (re: C.A. 83-2793; 83-2940; 83-3177; 83-3289; 83-3587; 83-3793; 83-3890; 84-331; 84-332; 84-542; 84-1707; 84-1710; 84-2672; 84-2858; 85-2788; 85-3444) (ks)

* * *

1994

Mar 14 MEMORANDUM filed 2/14/94 by pltfs in opposition to KAL's motion to set aside the Liability judgment. Exhibit (1); Affidavit (1). (ks)

Mar 22 REPLY MEMORANDUM by pltf in opposition to KAL's mtoion to set aside the liability judgment; Attachment. (ks)

Apr. 11 MOTION by Defendant, Korean Air Lines Co., Ltd. to strike Sur-Reply of Plaintiffs filed in copposition to motion to set aside and vacate the final judgment on the issue of liability and grant a new trial pursuant to Fed. R. Civ. Pro. 60(b); exhibit (A), (re: C. A. 83-2793, 83-2940, 83-3177, 83-3289, 83-3587, 83-3793, 83-3890, 84-0331, 84-0332, 84-0542, 84-1707, 84-1710, 84-2672, 84-2858, 85-2788). (gf)

Apr. 13 CERTIFIED copy ORDER OF TRANSFER OR RETRANSFER filed 4/12/94 from Judicial Panel On Multidistrict Litigation transferring or retransferring the actions listed on Schedule A to the District of the District of Columbia, assigned to the Honorable Audrey E. Robinson, Jr., for additional centralized proceedings in this docket; Schedule A. (USDC, CD CA: C.A. 85-70, 85-72, 85-73, 85-77, 85-81, 85-2870, 85-3090, 85-3091, 85-3441)
(USDC, ND CA: C.A. 83-3446, 83-3444
(USDC, MA : C.A. 84-2630
(USDC, ED MI: C.A. 84-2461, 83-3470, 85-1446, 83-3903, 84-3339
(USDC, ED NY: C.A. 83-3463, 83-3467, 83-3468, 84-1959
(USDC, SD NY: C.A. 83-3448, 83-3450, 83-3453, 83-3458, 83-3460, 83-3462, 83-3902, 84-30, 84-864, 84-865, 84-866, 84-867, 84-868, 84-870, 84-872, 84-874, 84-875, 84-876, 84-2348, 84-2817, 84-2816, 85-2872). (md)

Apr 20 OPPOSITION by pltfs to KAL's motion to strike pltf's Sur-reply. (ks)

* * *

4/22 HEARING: motion of deft to vacate judgment and for new trial heard and taken under advisement: REP: Santa Zizzo ROBINSON, J. (ks)

* * *

July 1 MEMORANDUM OPINION AND ORDER denying KAL's motion to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to FRCP 60(b); and denying KAL's motion to strike plaintiffs' sur-reply. (N) ROBINSON, J. (md)

* * *

July 15 MOTION by deft. KAL for final judgment pursuant to FRCP54(b). (ks)

July 25 OPPOSITION by pltf to deft's motion for final judgment. (ks)

July 28 ORDER denying deft's motion for final judgment. (N) ROBINSON, J. (ks)

July 28 NOTICE OF APPEAL by KAL from Order entered 7/1/94; $5.00 filing fee and $100.00 docketing fee paid to U.S. Treasury; Copies mailed to Milton G. Sincoff, Donald Madole, Bennett Boskey, Joseph P. Muenkel, Juanita M. Madole, Kenneth P. Nolan, and Aaron J. Broder. (Applicable in all cases) (ks)

July 28 PRELIMINARY RECORD transmitted to USCA: USCA#_____ (ks)

* * *

9/14/95 - SEE CLOSED DOCKET BOOK FOR ENTRIES PRIOR TO SEPTEMBER 14, 1995 (mbd) [Edit date 12/27/95]

* * *

2/26/96	9	MOTION filed by defendant KOREAN AIR LINES CO. to dismiss all claims for non-pecuniary damages; Exhibit (1) (ks) [Entry date 02/27/96]
3/6/96	10	MEMORANDUM by plaintiff PLAINTIFFS LIAISON in opposition to motion to dismiss all claims for non-pecuniary damages [9-1] by KOREAN AIR LINES CO.; Exhibit (1) (ks) [Entry date 03/07/96]
3/12/96	11	REPLY by defendant KOREAN AIR LINES CO. to response to motion to dismiss all claims for non-pecuniary damages [9-1] by KOREAN AIR LINES CO. (ks) [Entry date 03/13/96]
3/18/96	–	MOTION HEARING before Judge Aubrey E. Robinson Reporter: Ben Leesman (dot)

* * *

6/4/96	14	MEMORANDUM OPINION AND ORDER by Judge Aubrey E. Robinson: granting motion to dismiss all claims for non-pecuniary damages [9-1] by KOREAN AIR LINES CO.; that plaintiff's claims for loss of society damages, mental anguish and grief, and pre-death pain and suffering be and hereby are dismissed with prejudice. (N) (copies filed in 83-2793, 83-2940, 84-331, 84-332, and 84-1710. (N) (dot)

* * *

7/1/96	16	JOINT MOTION by plaintiff PLAINTIFFS LIAISON, defendant KOREAN AIR LINES CO. for order amend Order of 6/4/96 to include statutory language from 28 USC 1292 (fiat) JUDGE ROBINSON (dot)

7/1/96	17	ORDER by Judge Aubrey E. Robinson: granting joint motion for order amend Order of 6/4/96 to include statutory language from 28 USC 1292 [16-1] by KOREAN AIR LINES CO., PLAINTIFFS LIAISON; these cases are stayed until further Order of the Court, amending order [14-1] to state "Certification for Interlocutory Appeal"; that these cases be and hereby are certified for interlocutory appeal pursuant to 28 USC 1292(b) because they involve controlling questions for law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation. (N) (dot)

* * *

8/29/96	20	CERTIFIED COPY of Order filed in USCA dated 96-8013, granting petition for permission to pursue an interlocutory appeal from the District Court's Order of 6/4/96; the parties may frame the issues in their briefs as they deem appropriate; the Clerk is directed to issue a briefing schedule. (ks) [Entry date 08/30/96]
8/29/96	21	NOTICE OF APPEAL by plaintiff from order [14-1], entered on: 6/4/96; No fees paid; Copies mailed to counsel of record. (ks) [Entry date 09/05/96]
9/5/96	–	TRANSMITTED PRELIMINARY RECORD on appeal [21-1] by PLAINTIFFS LIAISON to U.S. Court of Appeals (ks)
9/27/96	–	USCA #96-5278 assigned for appeal [21-1] by PLAINTIFFS LIAISON (ks) [Entry date 10/01/96]

* * *

RELEVANT DOCKET ENTRIES OF THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS-PROCEEDINGS	Filed
(H)07/10/96	5-Petition for Permission to pursue an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (m-09) [23].	
(H)07/16/96	5-Response to Petition for Permission to appeal (m-15) [23].	
(H)08/15/96	Per curiam Order filed that the petition for permission to pursue an interlocutory appeal from the June 4, 1996, be granted insofar as it requests leave to take an appeal from the June 4, 1996 order. The parties may frame the issues in their briefs as they deem appropriate. The Clerk is directed to issue a briefing schedule. (Before Circuit Judges Wald, Ginsburg and Sentelle).	
(H)08/15/96	Clerk's order filed directing the Clerk to transmit to the district court a certified copy of the order issued this date. The district court shall file the order as a notice of appeal pursuant to Fed. R. App. 5, and shall collect the mandatory docketing fee from counsel. Upon payment of the fee, the district court shall certify the preliminary record to this court after which the case will be assigned a regular docket number.	
9/24/96	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Plaintiffs Liaison Counsel [NOTICE OF APPEAL FROM THE USCA ORDER OF 08/15/96 GRANTING THE 1292(b) PETITION]. [225241-1] (jth)	

9/24/96	SUPPLEMENTAL TRANSMITTAL FROM USDC (Filing Fee for the Notice of Appeal paid on 09/09/96) [225245-1]. (jth)
9/24/96	CLERK'S ORDER filed establishing the initial briefing schedule [225334-1]: Appellant's brief and appendix due 11/4/96; Appellee's brief due 12/4/96; Appellant's reply brief due 12/18/96. (jth)
10/31/96	BRIEF filed by Appellant Plaintiffs Liaison [233230-1]. Copies: 15. Certificate of service date 10/30/96. (lvs)
10/31/96	JOINT APPENDIX filed [233231-1]. Copies: 10. (lvs)
11/13/96	CLERK'S ORDER filed to schedule oral argument [234526-1] before Judge Initials: PMW ARR JLB on 5/6/97. (cwc)
12/5/96	BRIEF field by Appellee Korean Airln Co Ltd [239124-1]. Copies: 15. Certificate of service date 12/4/96. (lvs)
12/18/96	REPLY BRIEF filed by Appellant Plaintiffs Liaison [242006-1]. Copies: 15. Certificate of service date 12/17/96. (lvs)
12/27/96	CORRECTED REPLY BRIEF filed by Appellant Plaintiffs Liaison [242856-1]. Copies: 15. Certificate of service date 12/26/96. (lvs)
4/16/97	PER CURIAM ORDER filed to allocate oral argument times: APET minutes – 15 ERES minutes – 15. [265968-1], one counsel per side to argue. [265968-2] Oral argument scheduled for 5/6/97,

	Form 72 notice of attorney arguing case – [265968-3] due 4/29/97 for Plaintiffs Liaison, for Korean Airln Co Ltd. (cwc)
4/24/97	FORM 72 filed by Attorney Andrew J. Harakas [268541-1] on behalf of appellee Korean Air Lines co., Ltd. (sgh)
4/25/97	FORM 72 filed by Attorney Juanita M. Madole [268519-1] on behalf of appellant Dooley. (sgh)
5/6/97	ORAL ARGUMENT HELD before Wald, Randolph, Buckley. (sgh)
7/11/97	JUDGMENT for the reasons in the accompanying opinion affirming [283906-1]. Before Judges Wald, Randolph, Buckley. (edb)
7/11/97	OPINION (15 pgs) for the Court filed by Judge Randolph. (edb)
7/11/97	CLERK'S ORDER filed that the Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing. (edb)
8/7/97	PETITION for rehearing [289269-1] and SUGGESTION, for rehearing in banc [289269-2] (19 copies) filed by Appellant Plaintiffs Liaison (c/s dated 8/6/97) (wmw)
8/28/97	PER CURIAM ORDER filed denying the petition for rehearing [289269-1]. (Mandate may issue on or after 9/5/97). Before Judges Wald, Randolph, Senior Circuit Judge Buckley. (lvs)

8/28/97	PER CURIAM ORDER, In Banc, filed denying the suggestion for rehearing in banc [289269-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Senior Circuit Judge Buckley. (lvs)
9/4/97	MOTION filed (5 copies) by Appellants Philomena Dooley, et al. (certificate of service dated 9/4/97) to stay issuance of the mandate. (lvs)
10/2/97	PER CURIAM ORDER filed granting the motion to stay mandate [295192-1]. The Clerk is directed to withhold issuance of the mandate until 10/24/97. Before Judges Wald, Randolph, Buckley. (lvs)
10/27/97	NOTICE filed by the Clerk, Supreme Court advising of the filing on 10/22/97 and docketing on 10/24/97 of a petition for writ of certiorari. Supreme Court Docket No. 97-704. [305085-1]. (jth)
1/14/98	NOTICE filed by Clerk, Supreme Court, advising of the entry of an order on January 9, 1998, granting certiorari and establishing a briefing schedule. Supreme Court Docket No. 97-704. [323137-1] (jth)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PHILOMENA DOOLEY, Personal Representative of the Estate of DR. CECILIO CHUAPOCO, deceased, and natural mother and guardian of and on behalf of, BRENDEN CHUAPOCO, MICHAEL CHUAPOCO, RICHARD CHUAPOCO, EOEN CHUAPOCO, MARIA CHUAPOCO and GRACE CHUAPOCO 419 Palmer Avenue Teaneck, New Jersey 07667 Plaintiff v. KOREAN AIR LINES CO., LTD., THE UNITED STATES OF AMERICA, and JEPPESEN-SANDERSON, INC. Defendants	CIVIL ACTION NO. 83-2793 AMENDED COMPLAINT PLAINTIFF DEMANDS A TRIAL BY JURY (Received January 24, 1984)

ACTION FOR WRONGFUL DEATH
AND SURVIVAL

COMES NOW the plaintiff, PHILOMENA DOOLEY, as Personal Representative of the Estate of DR. CECILIO CHUAPOCO, deceased, by and through her attorneys,

SPEISER, KRAUSE & MADOLE, and sues the defendants KOREAN AIR LINES CO., LTD., THE UNITED STATES OF AMERICA, and JEPPESEN SANDERSON, INC., alleging upon information and belief as follows:

1. Plaintiff, PHILOMENA DOOLEY, is a citizen and resident of the State of New Jersey. Plaintiff is presently in the process of receiving letters of administration from the Surrogates's Court of Bergen County, New Jersey.

2. The defendant Korean Air Lines Inc., is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. Korean Air Lines Inc. is authorized to do, and is doing, business in the District of Columbia.

3. The defendant Jeppesen Sanderson, Inc., is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. Jeppesen Sanderson, Inc., is authorized to do, and is doing, business in the District of Columbia.

4. At all times relevant hereto, there is complete diversity of citizenship between the plaintiff and the defendant KOREAN AIR LINES, CO. LTD. and JEPPESEN SANDERSON, INC., and the matter in controversy exceeds the sum of Ten Thousand ($10,000.00) exclusive of interests and costs.

5. The crash and resulting death which are the basis for this Complaint occurred on the high seas more than a marine league from the shore of any state, the District of Columbia or any territory of the United States.

6. The United States of America is a sovereign and has submitted itself to suit in the United States District

Court for the District of Columbia pursuant to the Suits in Admiralty Act 46 U.S.C. §§ 741-752.

7. This court has jurisdiction of this suit against the defendant KOREAN AIR LINES, CO. LTD., and JEPPESEN SANDERSON, INC., based upon 28 U.S.C. § 1331, § 1332, § 1333, and § 1350 and/or 46 U.S.C. § 761-767.

8. This court has jurisdiction of this suit against defendant THE UNITED STATES OF AMERICA based upon 28 U.S.C. § 1333, 46 U.S.C. §§ 741-752, 761-767, general maritime and admiralty law and pursuant to this court's ancillary and pendant jurisdiction.

FIRST CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO. LTD. FOR WRONGFUL DEATH

9. At all times relevant hereto, the defendant KOREAN AIR LINES CO., LTD., was and is a common carrier in foreign air transportation engaged in the business of transporting persons and property for compensation and hire pursuant to a Foreign Air Carrier permit issued by the United States of America.

10. On August 31, 1983, the defendant KOREAN AIR LINES CO., LTD., owned, operated, maintained and controlled a certain Boeing 747-200 jet aircraft which was being operated as KAL Flight 007, and was the employer of the captain and crew.

11. Prior to August 31, 1983, decedent DR. CECILIO CHUAPOCO purchased a ticket and contract of carriage for KAL 007 which was scheduled to depart from JFK International Airport enroute to Seoul, Korea.

12. On August 31, 1983, through September 1, 1983, at all times relevant hereto, decedent DR. CECILIO CHUAPOCO was a passenger for compensation and hire on KAL Flight 007.

13. On August 31, 1983, through September 1, 1983, at all times relevant hereto, defendant KOREAN AIR LINES CO., LTD. operated, conducted and dispatched Flight 007 from its departure from JFK International Airport to its intermediate stopover at Anchorage, Alaska and, thereafter, from its departure from Anchorage on its enroute flight to Seoul, Korea.

14. At all times relevant hereto, defendant KOREAN AIR LINES CO., LTD., trained, educated and employed the captain of Flight 007, Chun Byung In; the first officer of Flight 007, Dong Hui Sohn; and the flight engineer of Flight 007, Eui Dong Kim. At all times relevant hereto, the aforenamed employees of defendant KOREAN AIR LINES INC., were acting within the course and scope of their employment with defendant KOREAN AIR LINES INC.

15. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD., Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, Korea. Flight 007's failure to follow its assigned flight path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

16. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet

Socialist Republics (U.S.S.R) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

17. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

18. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD., Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of DR. CECILIO CHUAPOCO.

19. Pursuant to the ticket purchased from defendant KOREAN AIR LINES CO., LTD., and as an air carrier in its status as of August 31, through September 1, 1983, the defendant agreed, and had a duty, to exercise the highest degree of care in transporting the decedent to his destination. The defendent failed to exercise the required degree of care in transporting the decedent, wilfully and wantonly performed hazardous operational acts with the knowledge that said acts were likely to result in injury to the passengers, wilfully performed hazardous operational acts with reckless and wanton disregard for the probable consequences that injury would result to the passengers, and intentionally violated known requirements and standards of care with knowledge that such violations could cause injury to the passengers in the following respects:

(a) by carelessly and wrongfully operating, and/or controlling said aircraft with respect to its piloting, navigating and following international procedures, and/or

(b) by failing to take the reasonable and safe precautions to see that the aircraft was not flown in hazardous airspace, thereby creating a danger and hazard to the passengers in the aircraft when the defendant knew or, in the exercise of reasonable care should have known, that such dangers and hazards were present at the place where the aircraft was shot down, and/or

(c) by failing to take reasonable and safe precautions to see that the aircraft was properly and safely operated on its approved and assigned course of flight, thereby creating a danger and a hazard to the passengers in the aircraft when the defendant knew, or in the exercise of reasonable care should have known, that the dangers and hazards of flight in U.S.S.R. territory existed, and/or

(d) by failing to train and supervise its agents, servants and employees in the reasonable and proper methods of operating, piloting, navigating and controlling the aircraft in general, as to piloting procedures in general and/or as to piloting procedures in operation near U.S.S.R. territory, and/or

(e) by failing to take reasonable and safe precautions to see that the aircraft was in a safe and proper condition to be flown as a common carrier in foreign air transportation when the defendant knew, or in the exercise of reasonable care should have known, that a danger and hazard to the passengers in the aircraft would be

created if the aircraft was not in a reasonably safe and proper condition and/or if it were operated in, over or near U.S.S.R. territory, and/or

(f) by failing to properly and safely operate and/or observe the cockpit instruments in the aircraft in question, including, but not limited to, the inertial navigation units, the weather radar units, and the radio navigation devices, and/or

(g) by failing to properly instruct and train the employees of the defendant, including the crew in question, as to how to properly and safely operate and/or observe and understand the cockpit instruments including, but not limited to, the inertial navigation units, the radar units and the radio navigation units, and the aircraft, and/or

(h) by operating the aircraft into dangerous, hazardous and unsafe conditions, in violation of all reasonable safety regulations, procedures and standards.

20. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the defendant and its wanton disregard for the safety of the passengers, the decedent DR. CECILIO CHUAPOCO was killed and the personal representative is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00), and demands same from the defendant, together with costs and interest.

SECOND CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO., LTD.

21. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 20, inclusive, as if fully set forth herein.

22. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the defendant and its wanton disregard for the safety of the passengers, DR. CECILIO CHUAPOCO was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death, for which plaintiff is entitled to recover damages herein.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant, together with costs and interests.

THIRD CAUSE OF ACTION AGAINST DEFENDANT UNITED STATES OF AMERICA FOR WRONGFUL DEATH

23. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 18, inclusive, as if fully and completely set forth herein.

24. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, operated and controlled or had access to certain electronic devices capable of radar tracking and listening to radio transmissions from aircraft, including Flight 007 through surface facilities, aircraft and ships in and around the geographical area in which the aircraft in question crashed, as well as in Alaska and its islands.

25. On and prior to August 31 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, by and through various civilian and military agencies, organizations and services, operated and controlled surface and airborne radio, radar and satellite tracking systems which could identify the track of the Flight 007, identify its accurate position and communicate with it during its flight from Anchorage, Alaska until the time of the crash.

26. On and prior to August 31, 1983 through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, through its military services, operated and controlled RC 135, E-4, E-3 and P-3 aircraft in the area where Korean Airlines Flight 007 operated.

27. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, knew, or in the exercise of reasonable care should have known, that its RC 135 aircraft displayed on radar a return of similar size, shape and speed to the Boeing 747 aircraft, and that the E-4 aircraft was a military version of Boeing 747-200 aircraft, and that B-747 aircraft were utilized by civil air carriers to transport fare paying passengers in Foreign Air Transportation location in the vicinity of the intended, flight path of Flight 007 assigned by the United States of America.

28. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, committed each and all of the negligent acts of omission or commission:

(a) in knowingly deploying its aircraft in geographical and temporal proximity to the departure and route of flight of Flight 007, thereby causing a danger and a hazard to the passengers on board the aircraft which the defendant knew or, in the exercise of reasonable care should have known, were being created inasmuch as defendant knew or should have known that the radar return from its aircraft and Flight 007 would be similarly received on USSR radar and that Flight 007 could be mistaken by the U.S.S.R. as a military aircraft and subjected to fatal defensive measures, and/or

(b) in failing to use available procedures and equipment to track the flight path of Flight 007 against its assigned flight path, thereby failing to advise the flight crew of Flight 007 of the departure of Flight 007 from its assigned course, which it knew, or in the exercise of reasonable care, the utilization of available equipment and proper conduct should have known, was occurring at the time prior to its crash into the Sea of Japan, and/or

(c) in failing to warn the flight crew of Flight 007 or Korean Air Lines officers or agents of the deviation from the assigned flight path which defendant knew, or in the exercise of reasonable care should have known, would create a danger and a hazard to the passengers of KOREAN AIR LINES INC., Flight 007.

29. As a direct and proximate result of the negligent and wrongful acts of the defendant, UNITED STATES OF AMERICA, the decedent DR. CECILIO CHUAPOCO was killed and the personal representative of the estate is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00), and demands same from the defendant, together with costs and interest.

FOURTH CAUSE OF ACTION AGAINST DEFENDANT THE UNITED STATES OF AMERICA

30. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 18, and 23 through 28, inclusive, as if fully and completely set forth herein.

31. As a direct and proximate result of the negligent and wrongful acts and omissions of defendant, THE UNITED STATES OF AMERICA, the decedent DR. CECILIO CHUAPOCO was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death and plaintiff is entitled to recover damages therefore pursuant to general maritime law.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant together with costs and interest.

FIFTH CAUSE OF ACTION AGAINST DEFENDANT JEPPESEN SANDERSON, INC. FOR NEGLIGENCE

32. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 18 and 23 through 28, inclusive, as if fully and completely set forth herein.

33. Prior to and at all times mentioned herein, defendant, JEPPESEN SANDERSON, INC. was engaged in the business of planning, designing, manufacturing, modifying, inspecting and sale of various types of navigational aids, including enroute charts displaying flight paths or airways for assigned international routes, which it sold and distributed to various airlines and companies throughout the United States of America and the world.

34. Prior to August 31, 1983, JEPPESEN SANDERSON, INC. planned, designed, manufactured and inspected enroute charts for assigned international routes, including R-20, and the subject maps were thereafter sold, and were eventually delivered to Korean Air Lines Co. Ltd for use in its business as a common carrier of passengers and property for hire.

35. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the crew of Korean Air Lines Co. Ltd. Flight 007 utilized such navigational aids produced by defendant, JEPPESEN SANDERSON, INC., including enroute charts for assigned international route R-20, from their departure from JFK International Airport to its intermediate stopover at Anchorage, Alaska and thereafter, from its departure from Anchorage on its enroute flight to Seoul, Korea.

36. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, Korean Air Lines Co. Ltd. Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, Korea. Flight 007's failure to follow its assigned flight

path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

37. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics (U.S.S.R) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

38. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

39. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, Korean Air Lines Co. Ltd. Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of DR. CECILIO CHUAPOCO.

40. Defendant, JEPPESEN SANDERSON, INC., owed a continuing and non-delegable duty to all passengers aboard Korean Air Lines Flight 007 on August 31, 1983 and September 1, 1983, including this plaintiff's decedent, to exercise reasonable diligence and due care in the planning, design, manufacture, modification and inspection of its navigational aids, including enroute charts for route R-20; to develop, prepare, supply and make available to operators of said aircraft all necessary, proper and reasonable instructions, information, advice, limitations, warnings, data and other information so that

said operators might safely operate said aircraft in such a fashion that unreasonable risks and hazards to passengers might be avoided.

41. The death of plaintiff's decedent aboard Korean Air Lines Flight 007 on August 31 and September 1, 1983, was proximately caused by the careless and negligent acts and omissions on the part of the defendant JEPPESEN SANDERSON, INC., its agents, servants and employees and wrongful breach on the part of the defendant JEPPESEN SANDERSON, INC., its agents, servants and employees of its continuing and non-delegable duty hereinbefore described as follows:

(a) in failing to publish or promulgate safe and adequate warnings on its navigation aids for flight in, over or near U.S.S.R. territory; and/or

(b) in failing to adequately and reasonably warn the operators of flights on R-20 of the hazards and dangers associating with piloting and navigating aircraft in hazardous airspace, thereby creating a danger and a hazard to the passengers in the aircraft when the defendant knew, or in the exercise of reasonable care, should have known, that such dangers and hazards were present at the place where the aircraft was shot down; and/or

(c) in failing to take reasonable and safe precautions to clearly designate free flying areas from non-free flying areas on its enroute charts, thereby creating a danger and a hazard to the passengers in the aircraft when defendant knew, or in the exercise of reasonable care, should have known, that the dangers and hazards of flight in, over or near U.S.S.R. territory existed.

42. As a direct and proximate result of the negligent and wrongful misconduct of the defendant, decedent DR. CECILIO CHUAPOCO was killed and the personal representative is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00), and demands same from the defendant, together with costs and interest.

SIXTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC. FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES

43. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, and 33 through 40, inclusive, with the same full force and effect as if fully and completely set forth herein.

44. The defendant JEPPESEN SANDERSON, INC. held itself out to the public, as well as the passengers and users of said enroute charts for assigned international routes including R-20, as possessing superior knowledge and skill in the design, testing, inspection and production of said navigational aids and that this plaintiff's decedent as well as other passengers for hire on said aircraft, relied upon the aforesaid alleged superior knowledge and skill of said defendant, and they had no means of discovering any hidden defects, dangers or inadequacies in said enroute charts.

45. The defendant JEPPESEN SANDERSON, INC. expressly and impliedly warranted to all users, operators

and passengers on flights which utilized said charts, that said enroute charts were free from any and all hidden defects and dangers, and contained all necessary data, advice, instructions, limitations, warnings and other information and were otherwise of merchantable quality and fit for the purpose for which they were planned, designed, manufactured, assembled, tested, sold and intended to be used.

46. The defendant JEPPESEN SANDERSON, INC. breached its aforesaid warranties in that the said enroute charts, including the chart for R-20, were not free from hidden defects and dangers, and were not of merchantable quality, nor adequate nor fit for the purposes for which they were planned, designed, tested, inspected, produced, sold and intended to be used, and that said accident, and the resulting death of plaintiff's decedent, were caused as a direct and proximate result of said breach of warranties.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00) and demands same from the defendant together with costs and interest.

SEVENTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC. IN STRICT LIABILITY

47. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, 33 through 40, and 44 through 45, inclusive, with the same full force and effect as if fully and completely set forth herein.

48. Defendant JEPPESEN SANDERSON, INC. is strictly liable to the plaintiff in that its enroute charts for assigned international routes, including R-20, were defective, dangerous and unreasonably inadequate, which condition was unknown to plaintiff's decedent, and which was a proximate cause of the accident herein and the resulting death of plaintiff's decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00) and demands same from the defendant, together with costs and interest.

EIGHTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC.

49. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, 33 through 40, 44 through 45, and 48, inclusive with the same full force and effect as if fully and completely set forth herein.

50. As a direct and proximate result of the negligent and wrongful acts and omissions of the defendant JEPPESEN SANDERSON, INC. the decedent, DR. CECILIO CHUAPOCO, was caused to suffer serious and grievous conscious mental and physical pain and suffering, and fear of impending death, and plaintiff is entitled to recover damages therefore pursuant to general maritime law and applicable survival statutes.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant, together with costs and interests.

NINTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC. FOR PUNITIVE DAMAGES

51. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, 33 through 40, 44 through 45, 48 and 50, inclusive, with the same full force and effect as if fully and completely set forth herein.

52. Defendant, JEPPESEN SANDERSON, INC., a corporation, by its agents and servants was guilty of reckless, wilful and wanton acts and omissions which evidenced a total and conscious disregard of the safety of the passengers on board Korean Air Lines Flight 007 on August 31 and September 1, 1983, a flight which utilized enroute charts produced by defendant, and which proximately caused the death of the plaintiff's decedent.

53. The reckless, wilful and wanton conduct which evidenced a total and conscious disregard for the safety of plaintiff's decedent under the foregoing circumstances justifies an award of punitive damages.

WHEREFORE, for the foregoing reasons, plaintiff seeks, in addition to the compensatory damages claimed herein, an additional award of TEN MILLION DOLLARS ($10,000,000.00) as punitive damages.

FOR THE FOREGOING REASONS, the plaintiff demands judgment of the defendants, jointly and severally, for compensatory damages of FIVE MILLION DOLLARS ($5,000,000.00) for wrongful death and TWO MILLION DOLLARS ($2,000,000.00) for decedent's survival action, together with costs and interest as well as for punitive damages in the amount of TEN MILLION DOLLARS ($10,000,000.00), together with interest and

costs and demands a trial by jury of all issues triable as of right by jury herein.

Respectfully submitted,

SPEISER, KRAUSE & MADOLE
1216 Sixteenth Street, NW
Washington, D.C. 20036
(202) 223 8501

By /s/ Donald W. Madole
DONALD W. MADOLE
and

by /S/ Juanita M. Madole
JUANITA M. MADOLE

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PHILOMENA DOOLEY, Personal Representative of the Estate of DR. CECILIO CHUAPOCO, deceased, and natural mother and guardian of, and on behalf of, BRENDEN CHUAPOCO, MICHAEL CHUAPOCO, RICHARD CHUAPOCO, EOEN CHUAPOCO, MARIA CHUAPOCO and GRACE CHUAPOCO 419 Palmer Avenue Teaneck, New Jersey 07667 Plaintiff v. KOREAN AIR LINES CO., LTD., THE UNITED STATES OF AMERICA, and JEPPESEN-SANDERSON, INC. Defendants	:	CIVIL ACTION NO. 83-2793 Judge Aubrey E. Robinson, Jr. **ANSWER TO AMENDED COMPLAINT**

KOREAN AIR LINES, LTD. (hereinafter KAL), by its attorneys, CONDON & FORSYTH, for its Answer to the Amended Complaint herein:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 3, 4, 5, 6, 7 and 8 of the Amended Complaint.

2. Denies the allegations in paragraph 2 of the Amended Complaint, except that it admits that defendant KAL is a foreign corporation duly organized and existing under the laws of the Republic of South Korea which does business in the District of Columbia.

AS TO THE FIRST
CAUSE OF ACTION

3. Denies the allegations in paragraphs 9, 10 and 14 of the Amended Complaint, except that it admits that on September 1, 1983 defendant KAL owned and operated a certain Boeing 747 model aircraft, which was being operated as its regularly scheduled Flight No. KE 007 from New York, New York, U.S.A. to Seoul, South Korea, when it was shot down over the sea of Japan and further admits that the members of the flight crew of said flight were employees of defendant KAL.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 11, 12, 16, 17 and 18 of the Amended Complaint.

5. Denies the allegations in paragraphs 15, 19 and all its subparts, and 20 of the Amended Complaint.

AS TO THE SECOND
CAUSE OF ACTION

6. Answering paragraph 21 of the Amended Complaint, defendant KAL repeats, reiterates and realleges

each and every answer to the allegations in paragraph 1 through 20 of the Complaint with the same force and effect as if set forth herein fully and at length.

7. Denies the allegations in paragraph 22 of the Amended Complaint.

AS TO THE THIRD
CAUSE OF ACTION

8. The allegations in the Third Cause of Action of the Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE FOURTH
CAUSE OF ACTION

9. The allegations in the Fourth Cause of Action of the Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE FIFTH
CAUSE OF ACTION

10. Answering paragraph 32 of the Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 31 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 33, 34, 35 and 37 through 42 of the Amended Complaint.

12. Denies the allegations in paragraph 36 of the Amended Complaint.

AS TO THE SIXTH
CAUSE OF ACTION

13. The allegations in the Sixth Cause of Action of the Amended Complaint are not directed to defendant KAL and therefore defendant KAL makes no answer with respect thereto.

AS TO THE SEVENTH
CAUSE OF ACTION

14. Answering paragraph 47 of the Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 46 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48 of the Amended Complaint.

AS TO THE EIGHTH
CAUSE OF ACTION

16. The allegations in the Eighth Cause of Action of the amended Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE NINTH
CAUSE OF ACTION

17. Answering paragraph 51 of the Amended Complaint, defendants KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 50 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 52 and 53 of the Amended Complaint.

AS AND FOR A FIRST SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

19. The Amended Complaint fails to state a claim against defendant KAL upon which relief can be granted.

AS AND FOR A SECOND SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

20. Plaintiff lacks the capacity to bring this action.

AS AND FOR A THIRD SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

21. The Amended Complaint should be dismissed pursuant to rules 12(b)(7) and 19(a) of the Federal Rules of Civil Procedure for failure to join a necessary party plaintiff.

AS AND FOR A FOURTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

22. The Amended Complaint should be dismissed pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and Section 1391 of Title 28 of the United States Code for lack of proper venue.

AS AND FOR A FIFTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

23. The Amended Complaint should be dismissed pursuant to the doctrine of *forum non conveniens.*

AS AND FOR A SIXTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

24. The liability of defendant KAL, if any, with respect to the death of the plaintiff's decedent is limited in accordance with the provisions of the Warsaw Convention, defendant KAL's conditions of carriage and tariffs, and defendant KAL's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of $75,000.

AS AND FOR A SEVENTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

25. This Court lacks subject matter jurisdiction over this action as none of the four places specified in Article 28(1) of the Warsaw Convention, where this action must be brought, is in the United States.

AS AND FOR A EIGHTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

26. Pursuant to Article 20 of the Warsaw Convention, defendant KAL is not liable to the plaintiff herein because KAL, through its officers, agents and employees, took all necessary measures to avoid the damage allegedly sustained by plaintiff herein or because it was impossible for KAL, through its officers, agents and employees to take such measures.

NOTICE OF APPLICABILITY OF FOREIGN LAW

Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, defendant KAL hereby gives notice that it intends to raise issues concerning the law of a foreign country in this matter.

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. demands judgment dismissing the Amended Complaint, with costs and disbursements, or if such relief not be granted, that defendant KOREAN AIR LINES CO., LTD.'s liability be limited as prayed herein.

Dated: Washington, D.C.
February 14, 1984

CONDON & FORSYTH
1030 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 289-0500

By /s/ George N. Tompkins, Jr.
George N. Tompkins, Jr.
Attorneys for Defendant
KOREAN AIR LINES
CO., LTD.

TO: Speiser, Krause & Madole
1216 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

Mark A. Dombroff, Esq.
Director, Torts Branch
The Justice Department
Civil Division
Washington, D.C. 20530

Attorneys for the
United States of America

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER TO AMENDED COMPLAINT was this 14th day of February, 1984, served by first class mail upon the following:

SPEISER, KRAUSE & MADOLE
1216 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

Mark A. Dombroff, Esq.
Director, Torts Branch
The Justice Department
Civil Division
Washington, D.C. 20530

Attorneys for the
United States of America

/s/ Kerry O'Hanlon

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

KIMBERLY S. SAAVEDRA, as Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON, Deceased, and as Personal Representative of OLGA HJALMARSSON, OLIVIA HJALMARSSON, a minor, and ALEXANDER HJALMARSSON, a minor 412 W. 4th Street, Suite 206 Santa Ana, California 92701 Plaintiff, v. KOREAN AIR LINES, INC. and THE UNITED STATES OF AMERICA, Defendants.	MDL Docket No. 565 Civil Action No. 83-2940 AMENDED COMPLAINT PLAINTIFF DEMANDS A TRIAL BY JURY (Filed Sept. 26, 1985)

ACTION FOR WRONGFUL DEATH
AND SURVIVAL

COMES NOW the plaintiff, KIMBERLY S. SAAVEDRA, as Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON, deceased, by and through her attorneys, SPEISER, KRAUSE & MADOLE, and sues the defendants KOREAN AIR LINES, INC. and THE UNITED STATES OF AMERICA, alleging upon information and belief as follows:

1. Plaintiff, KIMBERLY S. SAAVEDRA, is a citizen and resident of the State of California. Plaintiff KIMBERLY S. SAAVEDRA was appointed as the Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON by the Superior Court, Orange County, California on August 19, 1985.

2. The defendant Korean Air Lines, Inc., is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. Korean Air Lines, Inc. is authorized to do, and is doing, business in the District of Columbia.

3. At all times relevant hereto, there is complete diversity of citizenship between the plaintiff and the defendant KOREAN AIR LINES, INC., and the matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

4. The crash and resulting death which are the basis for this Complaint occurred on the high seas more than a marine league from the shore of any state, the District of Columbia or any territory of the United States.

5. The United States of America is a sovereign and has submitted itself to suit in the United States District Court for the District of Columbia pursuant to the Suits in Admiralty Act 46 U.S.C. §§ 741-752.

6. This court has jurisdiction of this suit against the defendant KOREAN AIR LINES, INC., based upon 28 U.S.C. § 1331, § 1332, § 1333 and § 1350, and/or 46 U.S.C. § 761-767.

7. This court has jurisdiction of this suit against defendant THE UNITED STATES OF AMERICA based

upon 28 U.S.C. § 1333, 46 U.S.C. §§ 741-752, 761-767, general maritime and admiralty law and pursuant to this court's ancillary and pendant jurisdiction.

FIRST CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES, INC. FOR WRONGFUL DEATH

8. At all times relevant hereto, the defendant KOREAN AIR LINES, INC., was and is a common carrier in foreign air transportation engaged in the business of transporting persons and property for compensation and hire pursuant to a Foreign Air Carrier permit issued by the United States of America.

9. On August 31, 1983, the defendant KOREAN AIR LINES, INC. owned, operated, maintained and controlled a certain Boeing 747-200 jet aircraft which was being operated as KAL Flight 007, and was the employer of the captain and crew.

10. Prior to August 31, 1983, decedent JAN INGVAR ROLAND HJALMARSSON purchased a ticket and contract of carriage for KAL 007 which was scheduled to depart from JFK International Airport enroute to Seoul, Korea.

11. On August 31, 1981 [sic], through September 1, 1983, at all times relevant hereto, decedent JAN INGVAR ROLAND HJALMARSSON was a passenger for compensation and hire on KAL Flight 007.

12. On August 31, 1983, through September 1, 1983, at all times relevant hereto, defendant KOREAN AIR LINES, INC., operated, conducted and dispatched Flight 007 from its departure from JFK International Airport to

its intermediate stopover at Anchorage, Alaska and, thereafter, from its departure from Anchorage on its enroute flight to Seoul, Korea.

13. At all times relevant hereto, defendant KOREAN AIR LINES, INC., trained, educated and employed the captain of Flight 007, Chun Byung In; the first officer of Flight 007, Dong Hui Sohn; and the flight engineer of Flight 007, Eui Dong Kim. At all times relevant hereto, the aforenamed employees of defendant KOREAN AIR LINES, INC., were acting within the course and scope of their employment with defendant KOREAN AIR LINES, INC.

14. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES, INC. Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, Korea. Flight 007's failure to follow its assigned flight path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

15. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics (U.S.S.R) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

16. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

17. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES, INC., Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of JAN INGVAR ROLAND HJALMARSSON.

18. Pursuant to the ticket purchased from defendant KOREAN AIR LINES, INC., and as an air carrier in its status as of August 31, through September 1, 1983, the defendant agreed, and had a duty, to exercise the highest degree of care in transporting the decedent to his destination. The defendant failed to exercise the required degree of care in transporting the decedent, willfully and wantonly performed hazardous operational acts with the knowledge that said acts were likely to result in injury to the passengers, willfully performed hazardous operational acts with reckless and wanton disregard for the probable consequences that injury would result to the passengers, and intentionally violated known requirements and standards of care with knowledge that such violations could cause injury to the passengers in the following respects:

(a) by carelessly and wrongfully operating, and/or controlling said aircraft with respect to its piloting, navigating and following international procedures, and/or

(b) by failing to take the reasonable and safe precautions to see that the aircraft was not flown in hazardous airspace, thereby creating a danger and hazard to the passengers in the aircraft when the defendant knew or, in

the exercise of reasonable care should have known, that such dangers and hazards were present at the place where the aircraft was shot down, and/or

(c) by failing to take reasonable and safe precautions to see that the aircraft was properly and safely operated on its approved and assigned course of flight, thereby creating a danger and a hazard to the passengers in the aircraft when the defendant knew, or in the exercise of reasonable care should have known, that the dangers and hazards of flight in U.S.S.R. territory existed, and/or

(d) by failing to train and supervise its agents, servants and employees in the reasonable and proper methods of operating, piloting, navigating and controlling the aircraft in general, as to piloting procedures in general and/or as to piloting procedures in operation near U.S.S.R. territory, and/or

(e) by failing to take reasonable and safe precautions to see that the aircraft was in a safe and proper condition to be flown as a common carrier in foreign air transportation when the defendant knew, or in the exercise of reasonable care should have known, that a danger and hazard to the passengers in the aircraft would be created if the aircraft was not in a reasonably safe and proper condition and/or if it were operated in, over or near U.S.S.R. territory, and/or

(f) by failing to properly and safely operate and/or observe the cockpit instruments in the aircraft in question, including, but not limited to, the inertial navigation units, the weather radar units, and the radio navigation devices, and/or

(g) by failing to properly instruct and train the employees of the defendant, including the crew in question, as to how to properly and safely operate and/or observe and understand the cockpit instruments including, but not limited to, the inertial navigation units, the radar units and the radio navigation units, and the aircraft, and/or

(h) by operating the aircraft into dangerous, hazardous and unsafe conditions, in violation of all reasonable safety regulations, procedures and standards.

19. As a direct and proximate result of the negligent, wrongful and willful misconduct of the defendant and its wanton disregard for the safety of the passengers, the decedent JAN INGVAR ROLAND HJALMARSSON was killed and the personal representative is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TEN MILLION DOLLARS ($10,000,000.00), and demands same from the defendant, together with costs and interest.

SECOND CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES, INC.

20. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 19, inclusive, as if fully set forth herein.

21. As a direct and proximate result of the negligent, wrongful and willful misconduct of the defendant and its wanton disregard for the safety of the passengers, JAN INGVAR ROLAND HJALMARSSON, was caused to

suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death, for which plaintiff is entitled to recover damages herein.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant, together with costs and interest.

THIRD CAUSE OF ACTION AGAINST DEFENDANT UNITED STATES OF AMERICA FOR WRONGFUL DEATH

22. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 17, inclusive, as if fully and completely set forth herein.

23. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, operated and controlled or had access to certain electronic devices capable of radar tracking and listening to radio transmissions from aircraft, including Flight 007 through surface facilities, aircraft and ships in and around the geographical area in which the aircraft in question crashed, as well as in Alaska and its islands.

24. On and prior to August 31 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, by and through various civilian and military agencies, organizations and services, operated and controlled surface and airborne radio, radar and satellite tracking systems which could identify the track of the Flight 007, identify its accurate position and communicate with it during its flight from Anchorage, Alaska until the time of the crash.

25. On and prior to August 31, 1983 through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, through its military services, operated and controlled RC 135, E-4, E-3 and P-3 aircraft in the area where Korean Airlines Flight 007 operated.

26. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, knew, or in the exercise of reasonable care should have known, that its RC 135 aircraft displayed on radar a return of similiar size, shape and speed to the Boeing 747 aircraft, and that the E-4 aircraft was a military version of Boeing 747-200 aircraft, and that B-747 aircraft were utilized by civil air carriers to transport fare paying passengers in Foreign Air Transportation in the vicinity of the intended flight path of Flight 007, assigned by the United States of America.

27. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, committed each and all of the negligent acts of omission or commission:

(a) in knowingly deploying its aircraft in geographical and temporal proximity to the departure and route of flight of [sic] Flight 007, thereby causing a danger and a hazard to the passengers on board the aircraft which the defendant knew or, in the exercise of reasonable care should have known, were being created inasmuch as defendant knew or should have known that the radar return from its aircraft and Flight 007 would be similarly received on USSR radar and that Flight 007 could be

mistaken by the U.S.S.R. as a military aircraft and subjected to fatal defensive measures, and/or

(b) in failing to use available procedures and equipment to track the flight path of Flight 007 against its assigned flight path, thereby failing to advise the flight crew of Flight 007 of the departure of Flight 007 from its assigned course, which it knew, or in the exercise of reasonable care, the utilization of available equipment and proper conduct should have known, was occurring at the time prior to its crash into the Sea of Japan, and/or

(c) in failing to warn the flight crew of Flight 007 or Korean Air Lines officers or agents of the deviation from the assigned flight path which defendant knew, or in the exercise of reasonable care should have known, would create a danger and a hazard to the passengers of KOREAN AIR LINES, INC., Flight 007.

28. As a direct and proximate result of the negligent and wrongful acts of the defendant, UNITED STATES OF AMERICA, the decedent JAN INGVAR ROLAND HJALMARSSON was killed and the personal representative of the estate is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TEN MILLION DOLLARS ($10,000,000.00), and demands same from the defendant, together with costs and interest.

FOURTH CAUSE OF ACTION AGAINST DEFENDANT THE UNITED STATES OF AMERICA

29. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 17, and 22 through 27, inclusive, as if fully and completely set forth herein.

30. As a direct and proximate result of the negligent and wrongful acts and omissions of defendant, THE UNITED STATES OF AMERICA, the decedent JAN INGVAR ROLAND HJALMARSSON was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death and plaintiff is entitled to recover damages therefore pursuant to general maritime law.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant together with costs and interest.

FOR THE FOREGOING REASONS, the plaintiff demands judgment of the defendants, jointly and severally, for damages of TEN MILLION DOLLARS ($10,000,000.00) for wrongful death and TWO MILLION DOLLARS ($2,000,000.00) for decedent's conscious physical and mental pain and suffering, together with costs

and interest and demands a trial by jury of all issues triable as of right by jury herein.

Respectfully submitted
SPEISER, KRAUSE & MADOLE
1216 Sixteenth Street, NW
Washington, D.C. 20036
(202) 223-8501

/s/ By Donald W. Madole
DONALD W. MADOLE

and

/s/ By Juanita M. Madole
JUANITA M. MADOLE

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and

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

KIMBERLY S. SAAVEDRA, as Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON, deceased, and as Personal Representative of Olga Hjalmarsson, for Olivia Hjalmarsson, a minor, and Alexander Hjalmarsson, a minor, 412 W. 4th Street, Suite 206, Santa Ana, Ca. 92701 Plaintiff, v. KOREAN AIR LINES, CO., LTD., THE UNITED STATES OF AMERICA, Defendants.	Civil Action No. 83-2940 Judge Aubrey E. Robinson, Jr. AMENDED ANSWER TO AMENDED COMPLAINT (Filed Oct. 17, 1985)

KOREAN AIR LINES CO., LTD. (hereinafter KAL), by its attorneys, CONDON & FORSYTH, for its Amended Answer to the Amended Complaint herein:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 3, 4, 5, 6 and 7 of the Amended Complaint.

2. Denies the allegations in paragraph 2 of the Amended Complaint, except that it admits that defendant KAL is a foreign corporation duly organized and existing

under the laws of the Republic of South Korea with its principal place of business in Seoul, South Korea, which does business in the District of Columbia.

AS TO THE FIRST
CAUSE OF ACTION

3. Denies the allegations in paragraphs 8, 9, 12 and 13 of the Amended Complaint, except that it admits that on September 1, 1983 defendant KAL owned and operated a certain Boeing 747 model aircraft, which was being operated as its regularly scheduled Flight No. KE 007 from New York, New York, U.S.A. to Seoul, South Korea, when it was shot down over the Sea of Japan and further admits that the members of the flight crew of said flight were employees of defendant KAL.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 10, 11, 15, 16 and 17 of the Amended Complaint.

5. Denies the allegations in paragraphs 14, 18, and all its subparts, and 19 of the Amended Complaint.

AS TO THE SECOND
CAUSE OF ACTION

6. Answering paragraph 20 of the Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 19 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

7. Denies the allegations in paragraph 21 of the Amended Complaint.

AS TO THE THIRD
CAUSE OF ACTION

8. The allegations in the Third Cause of Action of the Amended Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE FOURTH
CAUSE OF ACTION

9. The allegations in the Fourth Cause of Action of the Amended Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS AND FOR A FIRST SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

10. The Amended Complaint fails to state a claim against defendant KAL upon which relief can be granted.

AS AND FOR A SECOND SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

11. Plaintiff lacks the capacity to bring this action.

AS AND FOR A THIRD SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

12. The Amended Complaint should be dismissed pursuant to Rules 12(b)(7) and 19(a) of the Federal Rules of Civil Procedure for failure to join a necessary party plaintiff.

AS AND FOR A FOURTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

13. The Amended Complaint should be dismissed pursuant to Rule 12(b) (3) of the Federal Rules of Civil Procedure and Section 1391 of Title 28 of the United States Code for lack of proper venue.

AS AND FOR A FIFTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

14. The Amended Complaint should be dismissed pursuant to the doctrine of forum non conveniens.

AS AND FOR A SIXTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

15. The liability of defendant KAL, if any, with respect to the death of the plaintiff's decedent is limited in accordance with the provisions of the Warsaw Convention, defendant KAL's conditions of carriage and tariffs, and defendant KAL's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of $75,000.

AS AND FOR A SEVENTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

16. This Court lacks subject matter jurisdiction over this action as none of the four places specified in Article 28(1) of the Warsaw Convention, where this action must be brought, is in the United States.

AS AND FOR AN EIGHTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

17. Pursuant to Article 20 of the Warsaw Convention, defendant KAL is not liable to the plaintiff herein because KAL, through its officers, agents and employees, took all necessary measures to avoid the damage allegedly sustained by plaintiff herein or because it was impossible for KAL, through its officers, agents and employees to take such measures.

NOTICE OF APPLICABILITY OF FOREIGN LAW

Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, defendant KAL hereby gives notice that it intends to raise issues concerning the law of a foreign country in this matter.

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. demands judgment dismissing the Amended Complaint, with costs and disbursements, or if such relief not

be granted, that defendant KOREAN AIR LINES CO., LTD.'s liability be limited as prayed herein.

Dated: Washington, D.C.
October 16, 1985

CONDON & FORSYTH
1100 Fifteenth Street, N.W.
Washington, D.C. 20005.
(202) 289-0500

/s/ By George N. Tompkins, Jr.
George N. Tompkins, Jr.
Attorneys for Defendant
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CO., LTD.

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Jan Von Flatern, Esq.
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271

Attorneys for the United
States of America

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER TO SECOND AMENDED COMPLAINT was this day served by first class mail upon the following:

Juanita Madole, Esq.
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1216 Sixteenth Street, N.W.
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Attorneys for PLAINTIFF

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Washington, D.C. 20044

Mark A. Dombroff
Hughes, Hubbard & Reed
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attorneys for DEFENDANT
U.S.A.

Dated: October 16, 1985 /s/ Patricia A. Donnelly

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565

CIVIL ACTION NOS.
83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 84-2788,

Filed April 8, 1993

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1993,

MEMORANDUM OPINION

Before the Court are several pretrial motions filed by the defendant and plaintiffs in these case [sic]. They include: (1) KAL's motion requesting that Plaintiffs' damages be limited to those recoverable under the Death On the High Seas Act ("DOSHA"); (2) KAL's motion for partial summary judgment for decedents' Pre-death Pain and Suffering Claims; (3) KAL's Motion in Limine to Exclude the testimony of Experts on Pre-death Pain and Suffering; (4) KAL's Motion in Limine to Exclude any and all reference and evidence of KAL's negligence and wrongful misconduct; and (5) Plaintiffs' Motion for Prejudgment Interest.

A. Applicable Law

Defendant argues that the determination of damages in these cases should be governed exclusively by the Death on the High Seas Act (DOSHA), 46 U.S.C. § 761 *et seq.* Plaintiffs contend that since these claims are brought pursuant to the Warsaw Convention, DOSHA cannot limit the damages recoverable. This Court agrees.

As this Court stated previously, DOSHA is not the exclusive remedy in these cases. The Court has jurisdiction based concurrently on 28 U.S.C. § 1331 (Federal Question, i.e. the Warsaw Convention) and on DOSHA. To hold that the conflicting portions of DOSHA supersede those of the Convention would "render the Convention meaningless insofar as it relates to aircraft accidents which occur on the high seas more that a marine league from the shore." *See* In re Korean Air Lines Disaster of September 1, 1993 (March ___, 1992) slip. op at 7.

The Warsaw Convention allows for the recovery of all "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. The Court of Appeals for the District of Columbia has held that "damages sustained" refers to actual harm experienced. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485 (D.D.C. 1991). To the extent that this is contrary to the provision of DOSHA, the Warsaw Convention shall prevail. Accordingly, defendant's Motion is DENIED.

B. Motions Concerning Pre-death Pain and Suffering

Defendant moves for partial summary judgment of decedents' pre-death pain and suffering claims and requests that the court exclude the experts who will testify about the claims. KAL argues that the claim and all testimony in support of the claim is based on speculation and conjecture. Plaintiffs argue that there is sufficient evidence to produce a material question of fact that makes summary judgment inappropriate. Further, they contend that the experts' opinions are based on provable facts and will assist there [sic] trier of fact in understanding the evidence or determining a fact in issue.

The Court concludes that summary judgment is not appropriate in this instance. A question of fact exists as to what took place on board the plane after the missile strike. The resolution of this matter is material to the pre-death pain and suffering claims. Therefore, the motion for partial summary judgment is DENIED. The admission of the expert testimony is an evidentiary matter that can only be properly determined during the course of the trial. To the extend [sic] that Plaintiffs can provide the evidence necessary to sustain these claims, it will be heard by the jury.

C. Reference to KAL's "Willful Misconduct"

Plaintiffs will not be allowed to make mention of KAL's negligence or "willful misconduct" during voir dire or the presentation of evidence in this case. The liability of the defendant is not at issue in these proceedings and any mention of the jury's findings would be

unduly prejudicial to the defendant. However, the jury must be told how the litigation got to this point. Therefore, the parties are to stipulate to a statement concerning the events that led to the crash that may be used in the openings and closings in these cases. This statement should be submitted to the Court no later than the close of business on April 19, 1993.

D. Prejudgment Interest

Plaintiffs request that the Court award them prejudgment interest at the prime rate from the date of the incident. The defendant argues that Plaintiffs are not entitled to such interest due to their vigorous pursuit of punitive damages. KAL contends that if the Court determines that prejudgment interest is appropriate, it should be award [sic] from the date the Supreme Court denied certiorari and at the 52-week Treasury Bill rate.

The Court finds no merit in KAL's argument to preclude the awarding of prejudgment interest. Accordingly, Plaintiffs will receive prejudgment interest on their damage awards. However, a Determination of the rate of interest will be made at a later date.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

DATE: April 8, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1993	:	MDL DOCKET NO. 565
	:	
	:	CIVIL ACTION NOS.
	:	83-2793
	:	83-2940
	:	83-2941
	:	83-3177
	:	83-3154
	:	83-3204
	:	83-3289
	:	83-3587
	:	83-3792
	:	83-3793
	:	83-3889
	:	83-3890
	:	84-0331
	:	84-0332
	:	84-0542
	:	84-1358
	:	84-1707
	:	84-1708
	:	84-1710
	:	84-2646
	:	84-2672
	:	84-2858
	:	85-2788

ORDER

(Filed Apr. 9, 1993)

Upon consideration of Defendant's Motion for Partial Summary Judgment, Motion in Limine to Preclude Expert Testimony on Pre-death Pain and Suffering, Motion in Limine to Exclude Reference to and Evidence of KAL's negligence and Wrongful Misconduct, and Motion

Regarding the Applicable Law, as well as plaintiffs' Motion for Prejudgment Interest; Plaintiffs' and Defendant's Oppositions thereto, and the Replies of both parties and the entire record in this case, and for the reasons stated in the accompanying Memorandum Opinion, it is by the Court this 8th day of April, 1993.

ORDERED, that KAL's Motion for Partial Summary Judgment, Motion in Limine to Preclude Expert Testimony on Pre-death Pain and Suffering, and Motion Regarding the Applicable-Law are DENIED; and it is

FURTHER ORDERED, that KAL's Motion in Limine to Exclude Reference to and Evidence of KAL's Negligence and Willful Misconduct is **GRANTED**; and it is

FURTHER ORDERED, that Plaintiffs' Motion for Prejudgment Interest is **GRANTED**, with the rate of interest to be determined at a later date.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CARL M. COLE, Administrator of the Estate of WOON KWANG SIOW, Deceased, Public Administrator, Surrogate Court, Plaintiff, v. KOREAN AIR LINES CO., LTD., Defendant.	MDL Docket No. 565 Civil Action No. 84-1710 Judge Aubrey E. Robinson, Jr.

THIRD AMENDED COMPLAINT

COMES NOW Plaintiff, CARL M. COLE, Administrator of the Estate of WOON KWANG SIOW, deceased, by and through his attorneys, SPEISER, KRAUSE, MADOLE & LEAR, and sues the Defendant, KOREAN AIR LINES CO., LTD. alleging upon information and belief as follows:

1. Plaintiff, CARL M. COLE, is a citizen and resident of the State of New York. Plaintiff, CARL M. COLE, was appointed Successor Administrator of the estate of WOON KWANG SIOW, deceased, by Order of Substitution of the Surrogates Court of Erie County, New York on October 2, 1991.

2. The Defendant KOREAN AIR LINES CO., LTD. is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. KOREAN AIR LINES CO., LTD. is

authorized to do, and is doing, business in the District of Columbia.

3. At all times relevant hereto, there is complete diversity of citizenship between the plaintiffs and the Defendant KOREAN AIR LINES CO., LTD. and the matter in controversy exceeds the sum of Ten Thousand ($10,000.00) exclusive of interests and costs.

4. The crash and resulting death which are the basis for this Complaint occurred on the high seas more than a marine league from the shore of any state, the District of Columbia or any territory of the United States.

5. This Court has jurisdiction of this suit against the Defendant KOREAN AIR LINES CO., LTD. based upon 28 U.S.C. § 1331, pursuant to the Warsaw Convention,[1] a treaty of the United States; 28 U.S.C. § 1332 and § 1333; and/or 46 U.S.C. § 761-767.

FIRST CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO. LTD. FOR WRONGFUL DEATH

6. At all times relevant hereto, the Defendant KOREAN AIR LINES CO., LTD. was and is a common carrier in foreign air transportation engaged in the business of transporting persons and property for compensation and hire pursuant to a Foreign Air Carrier permit issued by the United States of America.

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[1] Convention for Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *Reprinted in* 49 U.S.C. App. § 1502 note (1982)

7. On August 31, 1983, the Defendant KOREAN AIR LINES CO., LTD. owned, operated, maintained and controlled a certain Boeing 747-200 jet aircraft which was being operated as KAL Flight 007, and was the employer of the captain and crew.

8. Prior to the departure of KAL Flight 007 from JFK International Airport on August 31, 1983, decedent WOON KWANG SIOW was ticketed and had a contract of carriage entered into the United States for KAL Flight 007 which was scheduled to depart from JFK International Airport enroute to Seoul, South Korea.

9. On August 31, 1981 [sic], through September 1, 1983, at all times relevant hereto, decedent WOON KWANG SIOW was a passenger for compensation and hire on KAL Flight 007.

10. On August 31, 1983, through September 1, 1983, at all times relevant hereto, Defendant KOREAN AIR LINES CO., LTD. operated, conducted and dispatched Flight 007 from its departure from JFK International Airport to its intermediate stopover at Anchorage, Alaska and, thereafter, from its departure from Anchorage on its enroute flight to Seoul, South Korea.

11. At all times relevant hereto, Defendant KOREAN AIR LINES CO., LTD. trained, educated and employed the Captain of Flight 007, Chun Byung In; the First Officer of Flight 007, Dong Hui Sohn; and the Flight Engineer of Flight 007, Eui Dong Kim. At all times relevant hereto, the forenamed employees of Defendant KOREAN AIR LINES CO., LTD. were acting within the course and scope of their employment with Defendant KOREAN AIR LINES CO., LTD.

12. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD. Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, South Korea. Flight 007's failure to follow its assigned flight path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

13. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics (U.S.S.R.) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

14. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

15. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD. Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of WOON KWANG SIOW.

16. Pursuant to the ticket purchased from Defendant KOREAN AIR LINES CO., LTD. and as an air carrier in its status as of August 31, through September 1, 1983, the Defendant agreed, and had a duty, to exercise the highest degree of care in transporting the decedent to his

destination. The Defendant failed to exercise the required degree of care in transporting the decedent, wilfully and wantonly performed hazardous operational acts with the knowledge that said acts were likely to result in injury to the passengers, wilfully performed hazardous operational acts with reckless and wanton disregard for the probable consequences that injury would result to the passengers, and intentionally violated known requirements and standards of care with knowledge that such violations could cause injury to the passengers in the following respects:

(a) by carelessly and wrongfully operating, and/or controlling said aircraft with respect to its piloting, navigating and following international procedures, and/or

(b) by failing to take the reasonable and safe precautions to see that the aircraft was not flown in hazardous airspace, thereby creating a danger and hazard to the passengers in the aircraft when the Defendant knew, or in the exercise of reasonable care should have known, that such dangers and hazards were present at the place where the aircraft was shot down, and/or

(c) by failing to take reasonable and safe precautions to see that the aircraft was properly and safely operated on its approved and assigned course of flight, thereby creating a danger and a hazard to the passengers in the aircraft when the Defendant knew, or in the exercise of reasonable care should have known, that the dangers and hazards of flight in U.S.S.R. territory existed, and/or

(d) by failing to train and supervise its agents, servants and employees in the reasonable and proper

methods of operating, piloting, navigating and controlling the aircraft in general, as to piloting procedures in general and/or as to piloting procedures in operation near U.S.S.R. territory, and/or

(e) by failing to take reasonable and safe precautions to see that the aircraft was in a safe and proper condition to be flown as a common carrier in foreign air transportation when the Defendant knew, or in the exercise of reasonable care should have known, that a danger and hazard to the passengers in the aircraft would be created if the aircraft was not in a reasonably safe and proper condition and/or if it were operated in, over or near U.S.S.R. territory, and/or

(f) by failing to properly and safely operate and/or observe the cockpit instruments in the aircraft in question, including, but not limited to, the internal navigation units, the weather radar units, and the radio navigation devices, and/or

(g) by failing to properly instruct and train the employees of the Defendant, including the crew in question, as to how to properly and safely operate and/or observe and understand the cockpit instruments including, but not limited to, the inertial navigation units, the radar units and the radio navigation units, and the aircraft, and/or

(h) by operating the aircraft into dangerous, hazardous and unsafe conditions, in violation of all reasonable safety regulations, procedures and standards.

17. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the Defendant

and its wanton disregard for the safety of the passengers, the decedent WOON KWANG SIOW was killed. The Personal Representative of his estate is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TEN MILLION DOLLARS ($10,000,000.00), and demands same from the Defendant, together with costs and interest.

SECOND CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO., LTD.

18. Plaintiffs repeat, reassert and reallege each and every allegation contained in paragraphs 1 through 17, inclusive, as if fully set forth herein.

19. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the Defendant and its wanton disregard for the safety of the passengers, WOON KWANG SIOW was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death, for which the plaintiff Personal Representative of his estate is entitled to recover damages herein.

WHEREFORE, for the foregoing reasons, the plaintiff Personal Representative of the Estate of WOON KWANG SIOW, deceased, has been damaged in the amount of $2,000,000.00 and demands same from the Defendant, together with costs and interests.

FOR THE FOREGOING REASONS, the plaintiff Personal Representative of the Estate of WOON KWANG SIOW, deceased, demands judgment of the Defendant for

damages of TEN MILLION DOLLARS ($10,000,000.00) for wrongful death and TWO MILLION DOLLARS ($2,000,000.00) for decedent's conscious physical and mental pain and suffering, under applicable Survival Statutes and pursuant to the Warsaw Convention, together with costs and interest and demands a trial by jury of all issues triable as of right by jury herein.

DATE: September 12, 1994

Respectfully submitted,
SPEISER, KRAUSE, MADOLE
& LEAR
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By /s/ Juanita M. Madole
JUANITA M. MADOLE
D.C. Bar No. 218396
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Sept. 12, 1994, a copy of the foregoing Third Amended Complaint was sent, via first class mail, postage prepaid, to:

George N. Tompkins, III Esq.
Tompkins, Harakas, Elsasser & Tompkins
Westchester Financial Center
50 Main Street
White Plains, New York 10606

/s/ Karen E. Blacker
Karen E. Blacker,
Legal Assistant to
JUANITA M. MADOLE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL M. COLE, Administrator of the Estate of WOON KWANG SIOW, Deceased, Public Administrator, Surrogate Court, Plaintiff, v. KOREAN AIR LINES, CO., LTD., Defendant.	Civil Action No. 84-1710 (AER)

ANSWER TO THIRD AMENDED COMPLAINT

Defendant Korean Air Lines Co., Ltd., ("KAL") by and through its undersigned counsel, Tompkins, Harakas, Elsasser & Tompkins and Condon & Forsyth, hereby Answers Plaintiff's Third Amended Complaint ("Third Amended Complaint") as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Third Amended Complaint.

2. Denies the allegations in Paragraph 2 of the Third Amended Complaint, except that defendant KAL admits that it is a foreign corporation duly organized and existing under the laws of the Republic of South Korea which does business in the District of Columbia.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of the Third Amended Complaint.

4. Admits the allegations contained in Paragraph 4 of the Third Amended Complaint.

5. Admits the allegations in Paragraph 5 of the Third Amended Complaint.

FIRST CAUSE OF ACTION

6. Admits the allegations in Paragraph 6 of the Third Amended Complaint.

7. Denies the allegations in Paragraphs 7, 10, 11 and 12 of the Third Amended Complaint, except that KAL admits that on September 1, 1983, defendant KAL owned and operated a certain Boeing 747 model aircraft which was being operated as its regularly scheduled Flight KE007 from New York, New York, U.S.A. to Seoul, South Korea, when it was shot down by Soviet military aircraft and further admits that the flight crew of said flight were employees of defendant KAL.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 8, 13 and 14 of the Third Amended Complaint.

9. Denies the allegations in Paragraphs 9, 15, 16(a)-(h) and 17 of the Third Amended Complaint

SECOND CAUSE OF ACTION

10. Answering Paragraph 18 of the Third Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 17 of the Third Amended Complaint with the same force and effect as if herein set forth in full.

11. Denies the allegations in Paragraph 19 of the Third Amended Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

12. The Third Amended Complaint fails to state a claim against defendant KAL upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

13. Plaintiff lacks the capacity to bring this action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

14. The Third Amended Complaint should be dismissed pursuant to Rules 12(b)(7) and 19(a) of the Federal Rules of Civil Procedure for failure to join a necessary party plaintiff.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

15. The Third Amended Complaint should be dismissed pursuant to the doctrine of *forum non conveniens*.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

16. The liability of defendant KAL, if any, with respect to the death of the plaintiff's decedent is limited

in accordance with the provisions of the Warsaw Convention, defendant KAL's conditions of carriage and tariffs, and defendant KAL's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of $75,000.

NOTICE OF APPLICABILITY OF FOREIGN LAW

17. Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, defendant KAL hereby gives notice that it intends to raise issues concerning the law of a foreign county in this matter.

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. demands judgment dismissing the Third Amended Complaint together with costs, disbursements and such other and further relief as this Court deems proper in the circumstances.

Dated: December 8, 1994

CONDON & FORSYTH

BY: /s/ Timothy J. Lynes
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To: Juanita M. Madole, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer to Third Amended Complaint was served by First Class Mail this 8th day of December, 1994 upon:

Juanita M. Madole, Esq.
Speiser, Krause, Madole & Lear
1300 North Seventeenth Street
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Rosslyn, Virginia 22209-3800

Attorneys for Plaintiff

/s/ Andrew J. Harakas
Andrew J. Harakas

UNITED STATES DISTRICT COURT
For the District of Columbia

MDL Docket No. 565
Misc. No. 83-0345

83-2793 Dooley
83-2940 Saavedra
84-0331 Boyar
84-0332 Boyar
84-1710 Cunningham

Filed June 4, 1996

In re Korean Air Lines Disaster
of September 1, 1983,

MEMORANDUM OPINION AND ORDER

On September 1, 1983, Korean Air Lines ("KAL") flight KE007 was shot down by a Soviet military aircraft, after it had veered off its course into Soviet airspace, killing all 269 passengers. The liability of KAL for those deaths was determined in a multidistrict litigation action in the District Court for the District of Columbia.[1] In that action, a jury found that KAL's "willful misconduct" proximately caused the passengers deaths, thus allowing recovery beyond the Warsaw Convention's $75,000 cap on damages. *See* Warsaw Convention, Art. 25, 49 Stat. 3020; Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention

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[1] An extensive discussion of the facts of this case may be found in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

and Hague Protocol, *reprinted in note following* 49 U.S.C. App. § 1502 (1988 ed.). Following appeals of this action, the individual compensatory damages trials were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts. Several actions regarding the recoverable compensatory damages still remain before this Court.

Presently before the Court is Defendant KAL's Motion to Dismiss Claims for Nonpecuniary Damages. Defendant argues that damages for loss of society, survivor's mental grief, and for predeath pain and suffering of a decedent are not recoverable. The parties agree that Plaintiffs' claims for loss of society damages must be eliminated in light of *Zicherman v. Korean Air Lines Co., Ltd.*, ___ U.S. ___, 116 S. Ct. 629 (1996). KAL's Motion raises two issues: (1) Whether claims for mental grief, recoverable under Korean law, may be pursued in this Court after a choice of law analysis, and (2) whether survival damages for pre-death pain and suffering may supplement the wrongful death damages available under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*

I. Discussion

Article 17 of the Warsaw Convention makes a airline liable for "damages sustained" in the event of the death of a passenger, it provides:

> The carrier shall be liable for *damages sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the

> damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 301 (emphasis added).

Until the Supreme Court's decision in *Zicherman*, ___ U.S. ___, 116 S. Ct. at 629, various courts struggled with the question of which "damages" are available under the Warsaw Convention. *See, e.g., In re Korean Air Lines*, 932 F.2d. at 1475 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2nd Cir.), *cert. denied, sub nom. Rein v. Pan American World Airways, Inc.*, 502 U.S. 920 (1991). With *Zicherman* the Court put some of this confusion to rest, holding that "damage" means only "legally cognizable harm" and that "Article 17 leaves it to the adjudicating courts to specify what harm is cognizable." 116 S. Ct. at 633. The Court found support for its interpretation of "damage" in Article 17 through the express limitations of Article 24 of the Warsaw Convention which provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.*

49 Stat. 3020 (emphasis added). Under the Court's interpretation of Article 24(2) when an "action is brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit

and what they may be compensated for." *Zicherman*, 116 S. Ct. at 634. The Court concluded that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice of law rules." *Id.* at 637.

A. Choice of Law

Having concluded that compensable harm is determined by domestic law, the *Zicherman* Court explained that its next logical step would be to determine which sovereign's domestic law applied. The Court did not conduct a choice of law analysis because the parties had previously agreed that the issue of compensable harm was governed by United States law. The Court held, however, that where United States law governed, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* (1988), supplied the substantive law of damages for an aircraft crash on the high sea. *Id.* at 636.

This Court has not been spared the choice of law question regarding which sovereign's domestic law governs compensable harm. Jurisdiction in these actions is premised on the federal treaty, the Warsaw Convention, 28 U.S.C. § 1331, admiralty, 28 U.S.C. § 1333, and in part on diversity. Here the parties are diverse because the Plaintiffs are citizens of the United States and the Defendant is a foreign nation. In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941), the Court held that a federal court sitting in diversity must apply the choice of law principles of the state in which it sits.

Because jurisdiction in these cases is based only partly on diversity, application of the District of Columbia's choice of law rules is not necessarily required, especially in light of a potential conflict between the District of Columbia and a federal policy. In *O'Melveny & Meyers v. F.D.I.D.*, ___ U.S. ___, 114 S. Ct. 2048, 2055 (1994), the Court explained that a special federal rule is justified in "limited situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' "

The Court recognizes that there is "no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), but is guided by the Court of Appeals for the Sixth Circuit's determination that the Warsaw Convention's, "concrete federal policy of uniformity and certainty" would be undermined if a state choice of law rule is applied, and therefore a special federal rule is appropriate to govern this choice of law question. *Bickel v. Bowden*, ___ F.3d ___, 1996 WL 203349 at *3 (6th Cir. 1996). In discussing the important federal policy of uniformity and certainty embodied by the Warsaw Convention, the Court of Appeals for the Second Circuit explained:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. . . . Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see

how the existence of state law causes of action could fail to frustrate these purposes.

In re Air disaster at Lockerbie, Scotland, 928 F.2d. 1267, 1275 (2nd Cir. 1991). Application of the United States' various choice of law rules could have a deleterious effect on consistent determinations of the applicable rules regarding damages under the Warsaw Convention. Thus, this Court is convinced that a federal choice of law rule is necessary here.

In the absence of any established body of federal choice of law rules, courts have looked to the Restatement (Second) of Conflict of Laws (1969) (hereinafter "Restatements") as "a source of general choice of law principles and an appropriate starting point for applying federal common law in this area." *See Bickel*, at *3; *Harris v. Polskie Line Lotnicze*, 820 F.2d. 1000, 1003 (9th Cir. 1987). Section 175 of the Restatements provides a choice of law rule (known as the *lex loci delicti* rule) for a wrongful death action and creates a presumption in favor of law of the location where the injury occurred:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatements, § 175. The *lex loci delicti* rule in § 175 is difficult to apply in these cases because " it is not clear whether KE007 was shot down in Soviet airspace, over Japanese territory or in international waters." *In re Korean*

Air Lines, 932 F.2d at 1497 (Mikva, J. dissenting). Additionally, the Sixth Circuit recognized that assuming that the former U.S.S.R. was the place the injury occurred, "the U.S.S.R. is ceased to exist . . . [and therefore] no longer has a judicially cognizable interest in these matters." Furthermore, the parties have limited their choice of law arguments to whether the United States or the law of Korea applies, and the Court finds that these countries should be the focus of the choice of law determination.

"In lieu of the *lex loci* rule, § 6 of the Restatements endorses a "most significant relationship" or "center of gravity" test, which requires considerations of several factors to determine which state has a more significant interest in having their law applied. "The governmental interest approach seeks to identify which jurisdictions may have an actual interest in having their substantive law apply to a particular controversy. . . . " *See In re Korean Air Lines*, 932 F.2d at 1497 (Mikva, J. dissenting). The relevant factors of § 6 include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue: (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied.

When considering the contacts of the two countries the Court notes that South Korea is KAL's place of incorporation, its principal place of business, and the place where

its crews are trained. On the other hand, the United States is the place of embarkation for many of the passengers, where the flight originated, and where all of the tickets were purchased.

Though both the United States and South Korea have significant contacts, consideration of the factors in § 6 convinces this Court that the United States law should govern these cases. The Court agrees with the analysis of the Sixth Circuit that "application of United States law supports 'ease in the determination and application of the law applied' " and " 'the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.' " weigh heavily in the favor of this United States." *Bickel*, at *4. Indeed, "certainty, predictability, and uniformity of result" would be supported because the Supreme Court has already applied the United States law when determining compensatory damages. *See Zicherman*, 116 S. Ct. at 629; *In re Korean Air*, 932 F.2d at 1475.

Furthermore, this Court agrees that because "these actions arise under the Warsaw Convention, neither nation can legitimately claim to offer greater protection of the 'the basic policies underlying the particular field of law,' or 'the needs of the interstate and international system.' " *Bickel*, at *4. Accordingly, the Court finds that the United States law is the most appropriate when determining the available compensatory damages for these actions.

B. Loss of Society and Survivor's Grief

In light of the Supreme Court's decision in *Zicherman*, that DOHSA, supplies the substantive United States law regarding damages and that loss of society damages are not available under DOHSA this Court concludes that survivor's grief damages are also unavailable.[2] The

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[2] Because the Court has determined that United States law governs the damages issues in this action and that DOHSA applies, Plaintiffs' argument that mental grief damages are available because Korean law permits claims for such damages is irrelevant.

Additionally, the Court rejects Plaintiffs' assertion that sections 1 and 4 of DOHSA are cumulative. 46 U.S.C. App. §§ 761, 764. Following Plaintiffs' interpretation of DOHSA, they are entitled to recover all pecuniary damages allowed by virtue of § 1 of DOHSA and in addition any damages allowed by Korean law pursuant to § 4. The Court finds that sections 1 and 4 are mutually exclusive rather than cumulative. *See In re Air Crash Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij N.V.*, 188 F. Supp. 594 (S.D.N.Y. 1960). Section 1 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Colombia [sic], or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensured.

Zicherman Court held that under § 762 of DOHSA recovery in a suit for death under § 761 "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefits the suit is brought." 46 U.S.C. App. § 762. Following the dictates of DOHSA, the Court concluded that loss-of-society damages, since they are not pecuniary, may not be recovered.

Damages for a survivor's grief are a non-pecuniary form of damages which represents compensation for an emotional response to wrongful death. *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). The Supreme Court has previously recognized that although federal maritime law permits dependent survivors to recover loss of society damages, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978). Having concluded in *Zicherman* that DOHSA precludes recovery for the nonpecuniary damages such as loss of society, survivor's grief should be similarly unavailable. The court agrees with the Sixth Circuit that there is no

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46 U.S.C. App. § 761. Section 4 provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States. . . .

42 U.S.C. App. § 764. The Court finds that while § 4 permits a cause of action based upon foreign law to be brought in admiralty in federal court, it only applies when foreign law applies pursuant to a choice of law analysis. In this case, it has been determined that United States law governs therefore the Court finds that § 4 is inapplicable and that only § 1 governs damages.

"distinction of which the *Zicherman* Court would have approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not." *Bickel*, at *5.

C. Survival Actions for Pre-Death Pain and Suffering

Plaintiffs also argue that DOHSA limits recovery for only wrongful death claims and does not preclude additional recovery for pre-death pain and suffering because it is a survival claim.[3] There is no dispute that recovery for the decedents' alleged pre-death pain and suffering is not recoverable under DOHSA.[4] Rather, Plaintiffs argue that their survival claims are distinct from wrongful death claims and are available under general maritime law and can supplement the damages recoverable under DOHSA.

This Court disagrees. Although, other courts have allowed a pain and suffering claim to supplement the

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[3] "A wrongful death cause of action belongs to the decedent's dependents. . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the deceased from the action causing death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622 (3d Cir. 1994); *aff'd* ___ U.S. ___, 116 S. Ct. 601 (1996).

[4] DOHSA is a wrongful death statute that restricts recoverable to the "pecuniary loss sustained." 46 U.S.C. App. § 762.

awards recoverable under DOHSA, it appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles.[5] The Court explained where DOHSA applies neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Zicherman*, 116 S. Ct. at 636 (citations omitted): *See also Higginbotham*, 436 U.S. at 618 (federal maritime law is not available to supplement DOHSA because with DOHSA Congress specifically spoke to the issue of damages and provided damages only for pecuniary losses, the Court may not provide supplementary damages beyond that authorized by Congress). Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that the non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

II. Conclusion

For the foregoing reasons, it is by the Court this 4th day of June, 1996.

ORDERED, that Defendant's Motion to Dismiss All Claims for Non-Pecuniary Damages be and hereby is GRANTED: and it is

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[5] In cases decided prior to *Zicherman*, several courts used general maritime survival principles to supplement the pecuniary damages available under DOHSA, with pain and suffering damages. *See e.g., Barbe v. Drummond*, 507 F.2d 795, 800 (5th Cir. 1974); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992).

FURTHER ORDERED, that Plaintiff's claims for loss of society damages, mental anguish and grief, and pre-death pain and suffering be and hereby are DISMISSED with prejudice.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

ORDER upon consideration of the Joint Motion for an Order Amending Order of June 4, 1996 to Include Statutory Language From 28 U.S.C. 1292(b) to Certify the Court's Order of June 4, 1996 for an Interlocutory Appeal and a Joint Motion for a Stay, it is by the Court this 1st day of July, 1996.

ORDERED, that the above-captioned actions be and hereby are STAYED until further Order of the Court; and it is

FURTHER ORDERED, that the Joint Motion for certification of this Court's Order of June 4, 1996 to the Court of Appeal for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), be and hereby is GRANTED; and it is

FURTHER ORDERED, that this Court's Order of June 4, 1996 be and hereby is amended to state:

Certification for Interlocutory Appeal

Generally, appellate review of a trial court's decision is only appropriate upon an appeal from a final judgement in the trial court, that is, only after all the issues involved in a particular lawsuit have been finally determined. See F. James and G. Hazard, Civil Procedures § 12.4 at 657 (1985). However, in 1958 Congress created a statutory exception to the final judgment rule, codified at

28 U.S.C. § 1292(b). Section 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

Thus, an interlocutory appeal can be properly certified only where the district court and the appellate court agree that (1) an order involves a "controlling question of law"; (2) this controlling question of law is one upon which "there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The within action [sic] are governed by the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Star. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502. The liability of Korean air for the death of all passengers on Korean Air Lines Flight KE007 has previously been established. See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C. Cir.), cert. denied 502 U.S. 994 (1991). The actions remaining in this Court assert recovery for damages and are postured following the Supreme Court's decision in Zicherman v. Korean Air Lines Co., Ltd., ___

U.S. ___, 116 S.Ct. 629 (1996), which held that the wrongful death cause of action is covered by the Death on the High Seas Act, 46 U.S.C. App. § 764 et seq. ("DOHSA"). Specifically, Plaintiffs claim a right to recovery damages for mental anguish and grief pursuant to 28 U.S.C. § 764 under Korean law and that there is a general maritime survival action separate and distinct from the wrongful death action under DOHSA which may co-exist with the wrongful death action.

The Court has granted Korean Air Lines' Motion to Dismiss all claims for nonpecuniary damages holding that mental anguish and grief damages may not be recovered and that a general maritime survival action may not supplement wrongful death damages under DOHSA. The pending issues have never been addressed by the United States Court of Appeals for the District of Columbia and were not addressed in Zicherman, ___ U.S. ___, 116 S.Ct. at 629.

The parties are of the opinion that the recoverable damages issues involve controlling questions of law which are of significant importance to the remaining damages trials currently pending in this Court and that there are substantial grounds for differences of opinion. The parties are further of the opinion that an immediate appeal from this Order will materially advance the ultimate termination of the remaining litigation.

This Court agrees. During the many years that this litigation has been in this Court and in the other district courts and circuit courts across the United Stats questions regarding recoverable damages have repeatedly confounded the courts. Complicating the determination of

available damages are circuit splits and the interplay between the Warsaw Convention, DOHSA, and general maritime law. With the Supreme Court's opinion in Zicherman, a major step was taken towards resolving the difficult question of available damages under the Warsaw Convention Guidance from the Court of Appeals for the District of Columbia Circuit regarding: (1) the availability of mental anguish and grief damages; and (2) the availability a survival action for pain and suffering damages in light in Zicherman, will hopefully assist in terminating these action [sic] once in [sic] for all. Therefore the Court certifies this Order dismissing Plaintiffs' claims for non-pecuniary damages for an immediate interlocutory appeal.

It is FURTHER ORDERED, that above-captioned cases be and hereby are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because they involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

117 F.3d 1477 (D.C. Cir. 1997)

Argued May 6, 1997 Decided July 11, 1997

No. 96-5278

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983
PHILOMENA DOOLEY, ET AL. V. KOREAN AIR LINES CO., LTD.

Appeal from the United States District Court
for the District of Columbia
(83ms00345)

Juanita M. Madole argued the cause and filed the briefs for appellants.

Andrew J. Harakas argued the cause for appellee. With him on the brief was *George N. Tompkins, Jr.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD and RANDOLPH, *Circuit Judges*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: On September 1, 1983, while Korean Air Lines flight KE007 was en route from New York City to Seoul, South Korea, via Anchorage, Alaska, a Soviet military aircraft shot down the airliner over the Sea of Japan, killing all 269 people on board. We have recounted details of the tragedy elsewhere. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476-79 (D.C. Cir. 1991).

In the ensuing litigation, a joint liability trial on the claims of 137 plaintiffs took place in the United States District Court for the District of Columbia. A jury found that Korean Air Lines had committed "willful misconduct," thus removing the Warsaw Convention's limitations on liability. This court affirmed. *Korean Air Lines Disaster*, 932 F.2d at 1479-84. (We did, however, vacate an award of punitive damages. *Id.* at 1484-90.) The actions were then remanded to the courts in which they had originated for individual proceedings on compensatory damages. This case comes to us as an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), in five damages actions that have not yet gone to trial.

Early in the damages phase of the litigation, the district court rejected Korean Air Lines's argument that the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, restricted the damages plaintiffs could recover. As discussed later, the Act permits only certain surviving relatives to recover "pecuniary" losses. The district court

believed another law – Article 17 of the Warsaw Convention (*see* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 3018) – "allows for the recovery of all 'damages sustained,' " meaning any "actual harm" any party "experienced" as a result of the crash. Thereafter, the Supreme Court reached a different conclusion: the Warsaw Convention, rather than providing a measure of damages, "permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules." *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629, 637 (1996).

After the *Zicherman* decision, Korean Air Lines moved in the district court to dismiss all claims for nonpecuniary damages, including damages for loss of society and mental grief, and damages for the decedents' predeath pain and suffering. Because *Zicherman* directed lower courts to look to some source of domestic law in a Warsaw Convention case, the district court began with a choice-of-law analysis and concluded that United States law governed these suits. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 12-14 (D.D.C. 1996). No party has challenged that determination. The court then ruled that the Death on the High Seas Act provided the applicable U.S. law, *id.* at 14, and that the Act did not permit the recovery of nonpecuniary damages, *id.* at 14-15.

Plaintiffs detect two faults in the district court's reasoning. While they concede that the Death on the High Seas Act itself provides no right to recover damages for a decedent's pre-death pain and suffering, they believe the

"general maritime law" recognizes such a cause of action. They also interpret a provision of the Death on the High Seas Act as allowing them to proceed under South Korean law despite the district court's undisputed choice-of-law finding that U.S. law applies. The law of South Korea, they say, permits them to recover damages for pre-death pain and suffering and for the mental grief of surviving relatives.

I

The first section of the Death on the High Seas Act allows the personal representative of any person who dies as the result of a "wrongful act, neglect, or default occurring on the high seas," to sue "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761.[1] The next section limits recovery to "a fair and just compensation for the pecuniary loss sustained by the persons for whose

[1] Section 761 states in full:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

benefit the suit is brought." *Id.* § 762.[2] Other sections establish a limitations period, *id.* § 763a, govern actions under foreign law, *id.* § 764, permit a personal injury suit to continue under the Act if the plaintiff dies while the action is pending, *id.* § 765, bar contributory negligence as a complete defense, *id.* § 766, exempt the Great Lakes and state territorial waters from the Act's coverage, *id.* § 767, and preserve certain state law remedies and state court jurisdiction, *id.*; *see also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-33 (1986).

That the Death on the High Seas Act does not permit recovery for a decedent's pre-death pain and suffering is clear enough. The Act provides a remedy only for injuries suffered by a limited class of surviving relatives, not the decedent. It is, after all, a "wrongful death" statute, giving survivors a right of action for losses they suffered as a result of the decedent's death, not a "survival" statute, allowing a decedent's estate to recover for injuries suffered by the decedent. *See Nelson v. American Nat'l Red Cross*, 26 F.3d 193, 199 (D.C. Cir. 1994); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 637 (3d Cir. 1994), *aff'd*, 116 S. Ct. 619 (1996); *McInnis v. Provident Life & Accident*

[2] Section 762 provides:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Ins. Co., 21 F.3d 586, 589 (4th Cir. 1994). Pain and suffering is, in any event, nonpecuniary.[3] On the other hand, § 762 of the Act permits only the recovery of "compensation for . . . pecuniary loss sustained."

Plaintiffs do not quarrel with any of this. But, they say, the Death on the High Seas Act is not the only pertinent source of U.S. law. As they see it, "general maritime law" – a species of federal common law – also applies and it allows a survival action for pre-death pain and suffering independent of any action under the Death on the High Seas Act.

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[3] Courts often point to pain and suffering as an example of a nonpecuniary loss. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 544 n.10 (1991); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 939 (1st Cir. 1995); *Korean Air Lines Disaster*, 932 F.2d at 1487. It is therefore strange to find several cases under the Jones Act, 46 U.S.C. App. § 688, describing damages for pre-death pain and suffering as pecuniary. *See, e.g., Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1090 n.7 (4th Cir. 1985); *Neal v. Barisich, Inc.*, 707 F. Supp. 862, 867 (E.D.La.), *aff'd*, 889 F.2d 273 (5th Cir. 1989). The Jones Act applies the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), to seamen. While FELA and the Jones Act permit only pecuniary wrongful death damages, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 68-71 (1913), FELA contains a survival provision (45 U.S.C. § 59) allowing recovery of damages for pre-death pain and suffering, *see St. Louis, Iron Mountain & Southern Ry. v. Craft*, 237 U.S. 648, 658 (1915). Rather than mislabeling pain and suffering as a pecuniary loss in Jones Act cases, it would be more accurate to recognize that under FELA and the Jones Act only wrongful death damages, not survival damages, need be pecuniary. *See Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 748-49 (9th Cir. 1980).

The Supreme Court identified a wrongful death cause of action under the general maritime law in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The death in *Moragne* occurred in waters within the state of Florida, *id.* at 376, so the Death on the High Seas Act did not apply. The Court held that general maritime law nevertheless provided the decedent's widow with a remedy for wrongful death caused by a violation of federal maritime duties. *Id.* at 409. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585-90 (1974), in which the death occurred in Louisiana waters, the Court held that recovery in a *Moragne* wrongful death action is not limited to pecuniary damages, as it is in actions under the Death on the High Seas Act. (Although the Court permitted nonpecuniary damages for loss of society in *Gaudet*, it said that "mental anguish or grief . . . is not compensable under the maritime wrongful-death remedy," 414 U.S. at 585 n.17.) A few years after *Gaudet*, the Court held that if a death occurs on the high seas, the Death on the High Seas Act, not general maritime law, governs and therefore nonpecuniary wrongful death damages may not be recovered. *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 622-26 (1978).

The Supreme Court has declined to say whether the reasoning of *Moragne* may be extended to permit a survival cause of action under the general maritime law. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990). We have never addressed the issue. Other courts of appeals have and a majority of them recognize survival actions. *See, e.g., Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4

F.3d 1084, 1093 (2d Cir. 1993); *Ward v. Union Barge Line Corp.*, 443 F.2d 565, 569 (3d Cir. 1971), *overruled in part on other grounds by Cox v. Dravo Corp.*, 517 F.2d 620 (3d Cir. 1975) (en banc); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 166 (4th Cir. 1972); *Miles v. Melrose*, 882 F.2d 976, 986 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987).

Three courts of appeals have dealt with the availability of a general maritime law survival action for deaths on the high seas. The First and Fifth Circuits have permitted general maritime law survival actions in cases in which the Death on the High Seas Act also applies. *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Barbe*, 507 F.2d at 799-800. The Ninth Circuit reached the opposite conclusion. *See Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir. 1996).[4] We believe the Ninth Circuit got it right.

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[4] Like the general maritime law, state wrongful death statutes may not be used to supplement Death on the High Seas Act remedies with nonpecuniary damages. *Tallentire*, 477 U.S. at 232. And although the Supreme Court has held that state survival and wrongful death statutes apply to at least some deaths occurring in territorial waters, *Yamaha*, 116 S. Ct. at 626-29, it has not said whether state survival statutes can apply to deaths on the high seas, *see Tallentire*, 477 U.S. at 215 n.1. A few lower courts have allowed recovery under a state survival statute to supplement recovery under the Death on the High Seas Act. *See, e.g., Solomon v. Warren*, 540 F.2d 777, 792 n.20 (5th Cir. 1976); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388-92 (3d Cir. 1971).

Assume general maritime law provides a survival action in some cases (we do not decide whether it does). Still, the effect of the Supreme Court's decision in *Higginbotham* must be evaluated. Nonpecuniary damages may be recovered under general maritime law, but not, the Court held, when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages. "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Higginbotham*, 436 U.S. at 623. "The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Id.* at 625. *Moragne* developed general maritime law in a space Congress had not occupied. But "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

Higginbotham thus instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

At almost the same time as the Sixty-Sixth Congress passed the Death on the High Seas Act, it enacted the Jones Act, 46 U.S.C. App. § 688. *See* Death on the High Seas Act, ch. 111, 41 Stat. 537 (1920); Merchant Marine (Jones) Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920). The Jones Act contains a survival provision applicable to certain maritime deaths. *See supra* note 3. A fair assumption is that the members of Congress who passed the Death on the High Seas Act understood the difference between wrongful death and survival actions. Their inclusion of a survival remedy in the Jones Act but not in the Death on the High Seas Act scarcely seems inadvertent.

Higginbotham stated that the Death on the High Seas Act expressed a congressional "judgment on such issues as . . . survival, and damages." 436 U.S. at 625. In support, the Court cross-referenced a footnote citing 46 U.S.C. App. § 765, a provision allowing a personal injury suit, initiated by a plaintiff who dies while the suit is pending, to be continued under the Act. A law professor has criticized the Court's statement as "casual," or "at best dictum and conceivably nothing more than an ill-advised gratuitous remark." Joseph F. Smith, Jr., *A Maritime Law Survival Remedy: Is There Life After Higginbotham?*, 6 MAR. LAW. 185, 196, 198 (1981). Dictum yes, ill-advised no. That the Death on the High Seas Act contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted. When Congress decides to go only so far it necessarily has decided to go no further.[5]

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[5] One of the drafters of the Death on the High Seas Act explained the Act's unusual, limited survival provision. The Act originally required suits to be filed "within two years from the date of [the] wrongful act, neglect, or default." Ch. 111, § 3, 41 Stat. 537. The survival provision of § 765 preserved for defendants the benefits of the Act's restricted limitations period without creating an undue barrier for wrongful death actions in cases in which the death did not occur soon after the event causing the injury. In such cases, a suit filed within two years while the decedent was still alive would preserve the action. *See* Robert M. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 126 (1921).

While the contours of plaintiffs' proposed survival action for deaths on the high seas are uncertain, they presumably would allow a decedent's estate to recover compensation for the decedent's injuries. This would necessarily expand the class of beneficiaries in the Death on the High Seas Act, which does not include decedents' estates. Yet *Higginbotham* held that "it would be no more appropriate to prescribe a different measure of damages than to prescribe . . . a different class of beneficiaries." 436 U.S. at 625. It was, to the Court, unthinkable that a legislatively-mandated class of beneficiaries could be judicially altered. Suits under the Act are "for the *exclusive* benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761 (emphasis added). In a death on the high seas case, there is no relevant difference between a court's giving a decedent's nondependent niece a right of action under general maritime law, which is clearly impermissible, and allowing the decedent's estate to sue for the decedent's injuries under the general maritime law.

Perhaps plaintiffs envisage a survival action that would not alter the Death on the High Seas Act's beneficiary class. One might permit a decedent's personal representative to sue for damages suffered by the decedent, but only for the benefit of those named in the Act. For example, the Federal Employers' Liability Act and the Jones Act give a decedent's personal representative the right to recover survival damages for the benefit of a fixed class of surviving relatives. *See* 45 U.S.C. § 59; 46 U.S.C. App. § 688.[6] Such an approach could leave the Death on the High Seas Act's beneficiary class intact. But it would change the damages available to the Act's beneficiaries. No longer would damages be limited to "compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought," 46 U.S.C. App. § 762. The beneficiaries would also receive compensation for nonpecuniary losses sustained by others – their decedents. That result *Higginbotham* forecloses.

Because the Death on the High Seas Act is a "wrongful death" statute, plaintiffs insist it has no bearing on survival remedies. They have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may

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[6] Under 45 U.S.C. § 59:

> Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. . . .

not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Plaintiffs also offer comparisons to the Jones Act, emphasizing that general maritime law remedies exist alongside Jones Act statutory remedies. The Jones Act provides compensation to seamen injured as a result of negligence, and in the event of death it provides both a wrongful death and a survival action. *See* 46 U.S.C. App. § 688; 45 U.S.C. §§ 51, 59. In *Miles*, the Supreme Court held that after *Moragne* a seaman's survivors could pursue a general maritime law wrongful death action alleging unseaworthiness (a strict liability theory), in addition to a Jones Act negligence claim. *Miles*, 498 U.S. at 29-30. Plaintiffs may have identified an inconsistency in how the Court treats the Jones Act and how it treats the Death on High Seas Act. But this case involves the Death on the High Seas Act, and we therefore are bound to follow *Higginbotham*. Moreover, *Miles* severely restricted the extent to which the general maritime law may expand the remedies available under the Jones Act. Relying on *Higginbotham*, the Court refused to allow the decedent's survivors to recover nonpecuniary wrongful death damages under the general maritime law because they could not recover such damages under the Jones Act. *Miles*, 498 U.S.

at 30-33. So while the general maritime law permits recovery for violations of duties other than those imposed by the Jones Act, such recovery may not exceed the recovery that would be available under the Jones Act if it applied. It is thus uncertain how much mileage plaintiffs could get out of their Jones Act analogy even if we disregarded the Court's pronouncements in *Higginbotham*.

II

Plaintiffs invoke South Korean law on the basis of this provision of the Death on the High Seas Act:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

46 U.S.C. App. § 764. As plaintiffs read § 764, it allows them to use an action under the Death on the High Seas Act to assert claims cognizable under foreign law. They have submitted the statement of a South Korean attorney that South Korean law would allow the recovery of damages for the decedents' pre-death pain and suffering and for the surviving relatives' mental anguish. The district court rejected the plaintiffs' submission as "irrelevant" in light of its determination that U.S. law applied. *Korean Air Lines Disaster*, 935 F. Supp. at 14 n.2.

The case law regarding § 764 is not uniform. Some opinions seem to support plaintiffs' view of § 764. *See Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459, 1467 (D.R.I. 1986); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1004-06 (S.D.N.Y. 1966); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94, 96 (S.D.N.Y. 1957); *lafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619, 622 (S.D.N.Y. 1952). Other opinions support the view that § 761 and § 764 are mutually exclusive and that plaintiffs therefore may not simultaneously advance claims under both U.S. and foreign law. *See In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175, 1185-88 (W.D.Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F. Supp. 594, 596-97 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962); *The Vulcania*, 41 F. Supp. 849 (S.D.N.Y. 1941), *modifying* 32 F. Supp. 815 (S.D.N.Y. 1940); *The Vestris*, 53 F.2d 847, 855-56 (S.D.N.Y. 1931).

If plaintiffs were correct, § 764 would license them to pick and choose among provisions of U.S. and South Korean law in order to assemble the most favorable package of rights against the defendant. That would be odd enough. But stranger still is the notion that South Korean law has any bearing on this case. Faced with *Zicherman*'s directive to make a choice-of-law determination, 116 S. Ct. at 637, the district court chose U.S. law, not South Korean law. Plaintiffs have not appealed this ruling. So how does South Korean law enter the picture? True, § 764 permits suits under foreign law when "a right of action is granted by the law of any foreign State." Since U.S. law, not South Korean law (or French law or Brazilian law), applies to this case, we are at a loss to understand how "a

right of action is granted by the law of " South Korea or any other foreign country. If South Korean law does not apply to a suit, it can hardly grant rights to the parties. Once the choice-of-law determination is in favor of U.S. law, only U.S. law can grant plaintiffs any sort of right of action.

It is fair to ask what function § 764 serves if not the one plaintiffs imagine. If, as we have decided, § 764 cannot be used to inject foreign law into a case controlled by U.S. law, one might suppose it has no purpose. When foreign law governs a case, the court would not consider the various provisions of the Death on the High Seas Act. But § 764 is not without significance.

The provision originated as an amendment recommended by the Senate Committee on the Judiciary. The Committee's report took the position (no longer current) that Congress had no power to create a right of action allowing the recovery of damages against foreigners or foreign vessels for deaths occurring on the high seas. S. REP. No. 66-216, at 4 (1919). The report also recognized that American courts permitted suits concerning foreign vessels to proceed under the law of the vessel's home country. *Id.* at 4-5. For example, the claims in *La Bourgogne*, 210 U.S. 95 (1908), were against a French vessel and its owners for deaths occurring on the high seas. The Supreme Court held that while U.S. law at that time did not recognize a wrongful death cause of action, wrongful death damages were available under French law in a proceeding in a U.S. court. *Id.* at 138-40. Section 764 was the legislative response to decisions permitting the owners of such foreign vessels to take advantage of U.S. statutes limiting their liability, *see, e.g., Oceanic Steam*

Navigation Co. v. Mellor, 233 U.S. 718, 731 (1914) (*"The Titanic"*).[7] The Committee report explained § 764 this way: "[A]s the Supreme Court has held that the limited liability statute of the United States applies to foreign ships seeking such limitation of liability in our courts, the committee recommends that the bill be amended by the insertion of [§ 764]." S. REP. No. 66-216, at 5.

It was immediately recognized that § 764 was "superfluous" insofar as it provided that U.S. courts would hear suits under foreign law in cases involving foreign vessels. Hughes, *supra*, 31 YALE L.J. at 118, 122; *see also* Calvert Magruder & Marshall Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 423-24 (1926). As the Senate Committee realized, that was already the practice. The real force of § 764 was its barring foreign vessel owners from taking advantage of American limitation of liability laws.

Another function of § 764, not discussed in the legislative history, is to require foreign law actions for wrongful deaths on the high seas to be brought in admiralty, at least if the plaintiffs wish to prevent the defendants from limiting their liability. *See The Silverpalm*, 79 F.2d 598, 600 (9th Cir. 1935); *Bergeron*, 188 F. Supp. at 597-98; *Iafrate*, 106 F. Supp. at 621-22; *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941). *But see Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925).

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[7] Under Rev. Stat. § 4283 (1878) (current version at 46 U.S.C. App. § 183), when a loss or injury occurred "without the privity, or knowledge" of a vessel owner, the owner could limit its liability to the value of its interest in the vessel and "her freight then pending."

Section 764 also made it explicit that American courts would continue to hear these suits under foreign law. While the courts' authority to do so did not depend on § 764, without § 764 the Death on the High Seas Act would have been open to the judicial interpretation that it was a congressional attempt – albeit an illegitimate one in the eyes of the Senate Committee – to impose a new American law of wrongful death on all suits brought in U.S. courts, including those against foreign defendants. Some maritime statutes of the period explicitly applied to foreigners and their vessels. *See, e.g.*, Act of Mar. 4, 1915, ch. 153, § 4, 38 Stat. 1164, 1165. Others, like the limitation of liability statute (which at that time applied to "the owner of any vessel," Rev. Stat. § 4283), were less clear on the point, but the courts interpreted them to apply to foreigners as well as Americans, *see, e.g., The Titanic*, 233 U.S. at 731. Thus, § 764 made it certain that the substantive provisions of the Death on the High Seas Act were not to displace foreign law in those cases in which foreign law already applied.

We therefore find no reason for concluding that § 764 requires the abandonment of normal choice-of-law principles, as plaintiffs suggest, allowing them to combine the most favorable elements of U.S. law, South Korean law, and perhaps also any other nation's law. Section 764 and foreign law play no role once a court determines that U.S. law governs an action.

Affirmed.

United States Court of Appeals
For The District of Columbia Circuit

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Wald and Randolph, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' petition for rehearing filed August 7, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

No. 97-704

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITIONERS' BRIEF ON THE MERITS

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60 pp

QUESTION PRESENTED

Does the Death on the High Seas Act (DOHSA) pre-empt an otherwise valid survival cause of action under general maritime law for the personal injuries sustained by a decedent prior to his/her death?

LIST OF PARTIES IN THE PROCEEDING BELOW

A. PETITIONERS

Petitioners are Philomena Dooley, Personal Representative of the Estate of Cecelio Chuapoco; Carl Cole, Personal Representative of the Estate of Woon Kwang Siow; and Kimberly S. Saavedra, Personal Representative of the Estate of Jan Hjalmarrson.

B. RESPONDENT

Respondent Korean Air Lines Co., Ltd. is a member of the Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of the Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunications Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.

LIST OF PARTIES IN THE PROCEEDING BELOW – Continued

Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation-SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported as *Dooley v. Korean Air Lines Co., Ltd. (In re Korean Air Lines Disaster of Sept. 1, 1983)*, 117 F.3d 1477 (D.C. Cir. 1997) and appears in the Joint Appendix at 93-110.

The memorandum order for the United States District Court for the District of Columbia granting Korean Air Lines' Motion for Partial Summary Judgment is reported as *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) and appears in the Joint Appendix at 77-92.

JURISDICTION

On December 5, 1983, Philomena Dooley, as the Personal Representative of the Estate of Cecelio Chuapoco, deceased, brought suit against Respondent in the United States District Court for the District of Columbia and later amended the complaint on January 24, 1984. J.A.[1] 12-30. On June 6, 1984, Mary Dee Martouche,[2] as the Personal Representative of the Estate of Woon Kwang Siow, deceased, brought suit against Respondent in the United States District Court for the District of Columbia. J.A. 64-91. On October 4, 1983, Kimberly S. Saavedra, as

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[1] Documents contained in the Joint Appendix are designated "J.A." and the page number. Documents contained in the Appendix to the Brief on the Merits are designated "App." and the page number.

[2] Carl M. Cole was subsequently substituted as the Personal Representative of the Estate of Woon Kwang Siow.

the Personal Representative of the Estate of Jan Hjalmarrson, brought suit against Respondent in the United States District Court for the District of Columbia, and later amended the complaint on September 26, 1985. J.A. 39-50.

On June 4, 1996, the District Court granted Respondent's Motion for Partial Summary Judgment. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996). J.A. 77-92. On July 1, 1996, the District Court certified the decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The petition for permission to pursue the interlocutory appeal was granted by the District of Columbia Circuit on August 15, 1996. On July 11, 1997, the District of Columbia Circuit issued their opinion and judgment affirming the District Court. *Dooley v. Korean Air Lines Co., Ltd.*, 117 F.3d 1477 (D.C. Cir. 1997). J.A. 93-110. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *en banc* to the District of Columbia Circuit which were denied on August 28, 1997. J.A. 111-112.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS AT ISSUE

Pertinent provisions of the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761-768 (1988 ed.) are reprinted in the Appendix to this Brief on the Merits at 2a-4a.

Pertinent provisions of the Warsaw Convention, *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502 (1988 ed.), are reprinted in the Appendix to the Brief on the Merits at 1a.

STATEMENT OF THE CASE

On September 1, 1983, decedents Cecelio Chuapoco, Jan Hjalmarrson, and Woon Kwang Siow were passengers on board Korean Air Lines' Flight KE007 enroute from New York City, New York to Seoul, South Korea. They were killed when their aircraft was shot down after it had invaded airspace of the former Soviet Union for several hours. All occupants of the Boeing 747 aircraft were killed when the aircraft ultimately crashed into the Sea of Japan approximately 12 minutes after damage was incurred. The passengers were all traveling on tickets such that the resulting claims were governed by the Warsaw Convention. The respective personal representative of each decedent's estate filed a Complaint which included a separate survival cause of action on behalf of the estate of each decedent for the decedent's pre-death pain and suffering and a wrongful death cause of action brought by the personal representatives in his/her fiduciary capacity.[3] The Complaints were filed in the United States District Court for the District of Columbia against Respondent, Korean Air Lines Co., Ltd. ("KAL"), and against various other defendants, all of whom except KAL were dismissed before the trial.

[3] DOHSA requires suit be brought by the personal representative of the estate of a decedent. *See*, 46 U.S.C. § 762.

In 1989, a jury found that KAL had committed "wilful misconduct" such that the Warsaw limitations on damages were inapplicable. That finding was upheld on appeal, although the Court of Appeals also vacated an award of punitive damages. *See generally, In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996). Because the Treaty requires a finding of "wilful misconduct" in order to deny the airline its per-passenger monetary limitation on damages (*see*, Article 25, App. 1a), the basis of liability at the trial was "wilful misconduct" rather than unseaworthiness or any other common law tort or maritime tort concept. After liability was resolved, the District Court remanded all of the actions that had not originally been filed in the District of Columbia to the originating courts and proceeded with motions practice on damages issues for the approximately 24 claims that remained in the District of Columbia.

In a pretrial motion, KAL requested the District Court to rule that DOHSA alone governed the claims and to dismiss all claims for non-pecuniary damages, including the estates' survival causes of action. The District Court denied the motion on the grounds that the Warsaw Convention and DOHSA were both implicated in the cases and that Article 17 of the Warsaw Convention permitted recovery for "damage sustained." *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-3587, *et al.* memo. op. at 2 (D.C. April 8, 1993). J.A. 58-63.

Several damages cases were tried in the District Court during 1993, each of which included survival

action claims for the decedents' pre-death pain and suffering for which verdicts were rendered. Each jury verdict was appealed to the District of Columbia Circuit. In **none** of the appeals in which survival action damages were awarded did KAL challenge the legal availability of a survival action recovery for pre-death pain and suffering although it did appeal the legal sufficiency of the evidence to support the verdicts. *Forman v. Korean Air Lines, Co., Ltd.*, 84 F.3d 446 (D.C. Cir.), *cert. denied*, 117 S.Ct. 582 (1996); *Oldham v. Korean Air Lines, Co., Ltd.*, 127 F.3d 43 (D.C. Cir. 1997), *cert. pending*, Docket No. 97-1180. Respondents' claims, however, were still pending trial when this Court decided *Zicherman, supra.*

Zicherman arose from the same air crash disaster that underlies Petitioners' claims, but it had proceeded to trial in the Southern District of New York and through the appellate process in the Second Circuit. This Court granted *certiorari* on the sole issue whether loss of society damages were available in a wrongful death action governed by the Warsaw Convention where the death occurred on the high seas.

Zicherman held that Article 17 of the Warsaw Convention was merely a pass-through and that whatever damages law would ordinarily be applied under the forum's choice-of-law rules should be applied in Warsaw-governed cases. *Id.* 516 U.S. at 228-229. For deaths that occur on the high seas, DOHSA is the source of wrongful death remedies for claims filed in the United States. *Zicherman* explicitly did not address the separate and independent survival cause of action created under general maritime law for pre-death pain and suffering. *Id.* 516 U.S at 230 n.4.

Following *Zicherman*, three Federal Circuit Courts addressed damages issues arising from the KAL catastrophe. *Bickel v. Korean Air Lines, Co., Ltd.*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g* 96 F.3d 151, *cert. denied* 117 S.Ct. 770 (1996); *Saavedra v. Korean Air Lines, Co., Ltd.*, 93 F.3d 547 (9th Cir.), *cert. denied*, 117 S.Ct. 584 (1996); *Forman, supra; Oldham, supra.*

In *Bickel, supra*, the Sixth Circuit originally held that there was no right to recover for pre-death pain and suffering. In an amended decision, however, it held that KAL had not properly preserved the issue on appeal by failing to raise it in its initial briefs. The Circuit denied KAL's challenge to the sufficiency of the evidence to sustain the verdicts for pre-death pain and suffering, finding that the factual circumstances on board KE007 justified an award of damages. *Bickel, supra*, 96 F.3d at 155-156. Similarly, in *Forman, supra*, and *Oldham, supra*, the D.C. Circuit held that KAL had not preserved its right to challenge the legal availability of the survival action award as it had not been raised in its initial briefs. The District of Columbia Circuit also affirmed the sufficiency of the evidence to sustain the verdicts for pre-death pain and suffering. *Forman, supra*, 84 F.3d at 448-449; *Oldham, supra*, 127 F.3d at 56-57.

In *Saavedra, supra*, however, the Ninth Circuit permitted KAL to overcome its procedural deficiencies and substantively addressed the issue. The Ninth Circuit relied heavily on *Zicherman* and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and read them to mean that DOHSA expressed Congress' intent to preclude all non-pecuniary damages and that the preclusion could not be circumvented by use of a general maritime law survival action

containing non-pecuniary remedies. *Saavedra, supra*, 93 F.3d at 553-54.

Petitioners' claims remained stayed in the District Court while the appellate process was proceeding in the other KAL cases. After *Zicherman*, KAL moved in the District Court to dismiss all claims for non-pecuniary damages in the cases still awaiting trial. J.A. 6, Docket Entry 2/26/96. Since the passengers' injuries occurred during the approximate 12 minute descent, the only non-pecuniary claim in the survival action was for physical and mental pre-death pain and suffering. The District Court granted the Motion. J.A. 6, Docket Entry 6/4/96. Under the direction of *Zicherman*, the District Court proceeded with a choice-of-law analysis and concluded that United States' law should be applied and that DOHSA was the applicable wrongful death law. It disallowed a general maritime law survival cause of action for damages for pre-death pain and suffering on the grounds that *Zicherman* held that DOHSA provided the exclusive remedy for damages and that DOHSA's remedies could not be supplemented with general maritime principles. The District Court certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the District of Columbia Circuit accepted the appeal.

The D.C. Circuit first acknowledged that this Court has thus far declined to identify a general maritime law survival cause of action akin to the wrongful death cause of action defined in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), but noted that a majority of Courts of Appeals had recognized such general maritime law survival actions for pre-death pain and suffering. *Dooley, supra*, 117 F.3d at 1480-1481. The Court of Appeals also

noted that the First and Fifth Circuits had permitted general maritime law survival actions in cases in which the wrongful death action was governed by DOHSA [*citing Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974)], although the Ninth Circuit had reached the opposite conclusion (*citing Saavedra, supra*). *Id.* The D.C. Court of Appeals chose to align itself with the Ninth Circuit.

The D.C. Circuit then assumed *arguendo* that general maritime law provides a survival cause of action. However, it held that DOHSA preempted such general maritime law inasmuch as Congress had legislated its judgment as to proper recoveries for deaths on the high seas and that those recoveries were limited to DOHSA damages. According to the D.C. Circuit, Congress had restricted the beneficiary class and recoverable damages for any and all of the surrounding circumstances that result in a death on the high seas to those contained in DOHSA. *Dooley, supra*, 117 F.3d at 1481-1483. Thus, it denied survival action damages for pre-death pain and suffering and, by necessary implication, any other survivor claims, no matter what the extent or duration of the injury.

During the pendency of Petitioners' Petition for Writ of *Certiorari* to this Court, the Eleventh Circuit decided *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371 (11th Cir. 1997). *Gray* explicitly rejected the reasoning of the Court below and of the Ninth Circuit in *Saavedra, supra*. While acknowledging that DOHSA is the exclusive source of recovery for a *wrongful death* on the high seas, the Eleventh Circuit, after a searching analysis of the

legislative history and the plain meaning of the words of DOHSA, concluded that Congress did not speak to survival action issues in DOHSA. It further concluded that a general maritime survival action for pre-death pain and suffering is cognizable and may be brought in conjunction with a death action under DOHSA.

SUMMARY OF ARGUMENT

This Court's prior references to survival causes of action have led lower courts and commentators to an understanding that a survival cause of action, separate and distinct from a wrongful death cause of action, exists to compensate an injured person with damages for personal injuries and associated expenses and that such an action may be maintained by the person's personal representative after his death. *See, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) ("Wrongful death statutes are to be distinguished from survival statutes."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (noting that several Courts of Appeal have identified a general maritime survival cause of action for pre-death pain and suffering as such claims have been "widely accepted."); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 n.7 (1996) (assuming without deciding that a general maritime survival action is created by *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)). However, this Court has never squarely addressed the issue at bar.

The Courts which have identified a general maritime law survival action have followed this Court's analysis in *Moragne, supra*, which recognized the general maritime

cause of action for wrongful death. In *Moragne*, the Court repudiated the historical disallowance of a common law death action by noting the universal acceptance of recoveries for wrongful death by federal and state legislatures, which evidenced a strong policy to allow the remedy. *Moragne* also specified that a single tortious act could result in two distinct but related harms giving rise to two separate causes of action: one on behalf of the person injured and one, in the case of death, to his/her dependents. *Moragne, supra,* 398 U.S. at 382.

The rationale advanced by *Moragne*, which recognized a general maritime law cause of action for wrongful death, is equally applicable to its companion survival action. As this Court has noted in *Miles, supra,* 498 U.S. at 34, survival action claims for pain and suffering have been "widely accepted" in state and federal statutes. *See also,* Speiser, Krause & Madole, *Recovery for Wrongful Death 3d*, Ch. 14 (1992); Keeton Prosser & Keeton on Torts at 126; Restatement 2d of Torts at 924, 926. Since survival actions have gained almost universal acceptance, there is no public policy which would militate against their recognition under general maritime law and which can coexist alongside a DOHSA death action. Acknowledgment of a maritime survival remedy would not "supplement" the remedies of DOHSA. The survival action is independent of DOHSA since it compensates for the related but distinct harm that arises from the same tortious act that causes the death. *See, Moragne, supra,* 398 U.S. at 382.

The second step in the analysis is to determine whether Congress, in enacting DOHSA, intended to preclude recoveries of damages for pre-death injuries. Historically, the admiralty court has operated under a

charter to give, rather than withhold, remedies. To displace the charter, Congress must act by an explicit statement of purpose or by the adoption of inflexible statutory rules. It has not done so in DOHSA. If a survival action is otherwise valid and cognizable, it must be allowed.

A review of the plain meaning of the language of DOHSA, of its legislative history, and of contemporaneous scholarly articles demonstrates that Congress did not intend to address, nor did it address, a survival cause of action. There is no language in the statute itself or any of the contemporaneous writings that purport to address any claims other than for wrongful death and then only on the high seas. Since Congress did not speak to the issue, it did not foreclose the ability of admiralty law to fill the gap with a general maritime law survival action.

Moreover, in 1980 Congress amended the limitations section of DOHSA to repeal 46 U.S.C. § 763 and enact 46 U.S.C. § 763a, which imposes a time limitation in which to commence "a suit for recovery of damages for personal injury or death, *or both*, arising out of a maritime tort." 46 U.S.C. § 763a (emphasis supplied). The 1980 amendment occurred after the lower courts had begun to recognize a general maritime law survival cause of action akin to the *Moragne* general maritime law death action. As statutes are to be construed to avoid assuming Congress included language which is surplusage, it must be inferred that Congress recognized that death actions and survival actions could coexist with each other, each providing distinctly different remedies.

The general maritime law survival action will apply whenever a non-seafarer[4] is injured by the wrongdoing of others on the high seas and subsequently dies. Depending upon the facts of the accident, the injured party could suffer weeks, months, or years before succumbing to death. During the interim, substantial medical expenses and loss of earnings could be incurred; and significant pain, suffering, and disfigurement could be endured. If a survival cause of action under general maritime law is not available to permit the injured party to recover damages for his injuries, the wrongdoer will escape legal responsibility for the consequences of his wrongdoing to the person against whom the wrong was wrought, not just in this case but in every other one, no matter how long the interval between the original injury and death may be.

ARGUMENT

I. GENERAL MARITIME LAW RECOGNIZES SURVIVAL ACTIONS FOR PRE-DEATH INJURIES

A. There is a Common Law Right to Recover for Personal Injuries, Including Medical Expenses; Loss of Earnings; and Pain, Suffering, and Disfigurement.

Maritime law has long recognized that a person injured on navigable waters may recover for the damage

[4] "Non-seafarer" is meant in the context used by this Court in *Yamaha Motor Corp., U.S.A., supra*, 516 U.S. at 205 n.2 as persons who are neither seamen covered by The Jones Act, 46 U.S.C. App. § 688 (1988 ed.) nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

and loss caused by those injuries. *Heredia v. Davies*, 12 F.2d 500, 501 (4th Cir. 1926); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405-406 (1970), (referring to the maritime body of law applied in personal injury cases); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 140 (5th Cir. 1972); *Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3rd Cir.), *cert. denied*, 385 U.S. 897 (1966). Less clear, however, was whether, if the injuries proved fatal, only one cause of action was cognizable, or whether a wrongful death action could be maintained independent of the recovery for the injuries. The Court clarified that ambiguity in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) (hereinafter *"Gaudet"*) by holding that the two were separate and independent actions.

In *Gaudet*, a longshoreman was seriously injured, but survived long enough to bring a suit for his personal injuries and loss of earnings. He died shortly after that litigation was terminated, and his widow brought a wrongful death action under the *Moragne* general maritime law to recover for her losses suffered as a result of her husband's death. In determining whether the wrongful death action was barred by the earlier settlement of personal injury claims, the Court noted that early cases had construed wrongful death statutes as independent of any right of action that the injured person may have for the personal injuries sustained. *Gaudet, supra*, 414 U.S. at 578 n. 5, *citing* F. Tiffany, *Death by Wrongful Act*, § 23 (2d Ed. 1913); 2 *Harper & James* § 24.2; *Schumacher, Rights of Action Under Death and Survival Statutes*, 23 Mich. L. Rev. 114, 121 (1924); *Blake v. Midland R. Co.*, 18 Q.B. (Ad. & E., N.S. 93, 110, 118 *Eng. Rep.* 35, 41 (1852); *Seward v. Vera Cruz*, 10 App. Cas. 59, 70 (Lord Blackburn); *Michigan*

Cent. R. Co. v. Vreeland, 227 U.S. 59, 68 (1913). If a wrongful death action was not separate and independent, but was merely a continuation of the action for personal injuries, *res judicata* would bar the subsequent death action where the personal injury action had been settled before death. *Gaudet, supra,* 414 U.S. at 578-579.

Gaudet held that *res judicata* would not preclude a wrongful death suit even if a personal injury suit has been previously resolved because the two remedies involve two distinctly different causes of action. *Id.* The Court noted that one line of cases which appeared to bar a wrongful death cause of action when the decedent had recovered for his injuries during his lifetime did so as a result of the specific statutory language of the wrongful death statute at issue which required the existence of an action that the decedent himself could have maintained at the time the wrongful death statute became effective. *Id.* 414 U.S. at 579-580, citing Lord Campbell's Act[5] and cases

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[5] Lord Campbell's Act, 9 & 10 Vict., c.93, An Act for Compensating the Families of Persons Killed by Accidents (Aug. 26, 1846): "Whereas no Action at law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person . . . : Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding, the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

interpreting the Act as conditioning recovery upon the existence of an actionable cause by the decedent at the time of his death. In the absence of a statute mandating that a right of action by the injured person still exists when the death occurs, the personal injury action is independent and grounded in wholly different principles.

Gaudet also noted that the other line of cases which appeared to preclude a wrongful death action when the personal injury action had been concluded also turned on the specific statutory language at issue. For example, the original FELA (Federal Employees Liability Act, 45 U.S.C. § 51) was written in the disjunctive, such that an election had to be made whether to recover for the injured person's damages while he was alive or proceed with a wrongful death action after his death. *Gaudet, supra,* 414 U.S. at 582, n. 9, *citing Seaboard Air Line R. Co. v. Oliver,* 261 Fed. 1, 2 (1919).

DOHSA neither conditions wrongful death recovery on the existence of a pending personal injury action nor requires an election of one remedy over the other. Thus, there are no statutory limitations embodied in DOHSA

"II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit the Action shall be brought . . .

"III. Provided always, and be it enacted That no more than One Action shall lie for and in respect of the same Subject Matter of Complaint . . . ".

which would preclude recovery in the death action independent of a personal injury action.

The Court in *Gaudet* also found it significant that DOHSA had not been interpreted to bar a wrongful death recovery where the decedent had already recovered for his personal injuries during his lifetime, *id.*, 414 U.S. at 583, n. 10, thus implying that there is a common law remedy for personal injuries occurring on the high seas.

Under traditional maritime law, as under the common law, an injured person's unresolved personal cause of action did not survive the injured person's death. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). In a majority of instances, Congress and state legislatures have changed the traditional rule by the enactment of survival statutes. *See, Miles, supra,* 498 U.S. at 33-34. The scope of the general maritime law survival action must be defined by how it compares with a death action and whether there is any overlap of remedies. This Court and the lower courts have consistently recognized that survival causes of action are separate and distinct from claims for wrongful death and that there are no overlapping remedies. Each kind of remedy is designed to compensate for different kinds of loss. *See, Moragne, supra,* 398 U.S. at 381; *Gaudet, supra,* 414 U.S at 578; *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984), citing *Gaudet, supra,* 414 U.S. at 573, 575 n. 2; *Kuntz v. Windjammer "Barefoot" Cruises Ltd.*, 573 F. Supp. 1277, 1284-85 (W.D. Pa. 1983); *Chute v. United States*, 466 F. Supp. 61, 62 (D. Mass. 1978); *In re Inflight Explosion of Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986*, 778 F. Supp. 625, *rev'd. on other grnds.* 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1944 (1993).

On the one hand, the wrongful death cause of action is designed to compensate the beneficiaries of the decedent for the losses that they themselves have sustained as a result of the decedent's death. Typically the elements of damages in a wrongful death claim include loss of support; loss of financial contributions; loss of parental advice, guidance, and training; loss of inheritance; loss of services; and, in some (non-DOHSA) instances, non-pecuniary damages for loss of society. *Azzopardi, supra,* 742 F.2d at 893; *Kuntz, supra,* 573 F. Supp. at 1284; *Chute, supra,* 466 F. Supp. at 62.

On the other hand, the survival cause of action is designed to compensate the personal representative of the decedent's estate (as the replacement holder of the claim after the injured person dies) for damages that the decedent himself could have recovered but for his death. *Azzopardi, supra,* 742 F.2d at 893; *Chute, supra,* 466 F. Supp. at 52; *Kuntz, supra,* 573 F. Supp. at 1284.

This Court, in *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199 (1996), affirmed the decision by the Court of Appeals for the Third Circuit, which included the following succinct explanation of the distinction between the wrongful death cause of action and the decedent's action for pain and suffering preceding death:

> . . . Throughout the previous discussion of the case law, reference has been made to wrongful death actions and to survival actions. Although they are often lumped together without any distinction . . . they are, in fact, quite distinct . . .

A wrongful death cause of action belongs to the decedent's dependents (or closest kin in the case of the death of a minor). It allows the beneficiaries to recover for the harm that *they* personally suffered as a result of the death, and it is totally independent of any cause of action the decedent may have had for his or her own personal injuries. Damages are determined by what the beneficiaries would have "received" from the decedent . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the *deceased* from the action causing death. Under a survival action, the decedent's representative recovers for the decedent's pain and suffering, medical expenses, lost earnings . . . and funeral expenses . . . *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 737-38 (3d Cir. 1994) (citations omitted; emphasis by the Court).

Since the two kinds of actions (death and survival) encompass separate and distinct measures of damages and beneficiaries, "American courts have painstakingly distinguished the two causes of action for many years." *Kuntz, supra,* 573 F. Supp. at 1285. *See also, Miles v. Melrose,* 882 F.2d 976, 985 (5th Cir. 1989) *rev'd. on other grnds. sub nom. Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.,* 4 F.3d 1084, 1093 (2d Cir. 1993).

The elements of damage in a survival action are different in nature than the elements of damage in the DOHSA death action and are, thus, not inconsistent with being brought in conjunction with a DOHSA action.

Damages for pain and suffering of the injured person and reimbursement for medical expenses, for example, have no corollaries in a wrongful death recovery. Loss of earnings between the time of injury and the time of death are awarded to the individual; wrongful death claims for loss of support to family members arise only after the death.[6]

B. General Maritime Law Provides for a Survival Action For Pre-Death Pain and Suffering.

The historical basis for the common law's prohibition against continuing an injured person's unresolved personal injury action after his death, as was discussed in *Moragne,* was grounded in the rule of *Baker v. Bolton,* 1 Camp. 493, 170 Eng. Rep. 1033 (1808) and the "felony-merger" doctrine. *The Harrisburg,* 119 U.S. 199 (1886), concluded that the admiralty had to follow the common law. In *Moragne,* Justice Harlan, writing for a unanimous Court, while not quite repudiating the validity of *The Harrisburg* at the time of the decision[7], noted the duty of the Court to acknowledge the impact of major legislative innovations, to wit: the wholesale adoption of statutes

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[6] The factual viability of the action will, of course, depend upon the circumstances in each case and whether the plaintiff can meet his/her burden of proof that the decedent survived an appreciable time between the injury and death and that decedent suffered the damages alleged.

[7] The Court did note, however, that the decision in *The Harrisburg* was "somewhat dubious even when rendered." *Moragne, supra,* 398 U.S. at 378.

permitting recovery for wrongful death, and to interweave the new policies with "the inherited body of common law principles." *Moragne*, 398 U.S. at 392.

Moragne established that general maritime law provided a cause of action for wrongful death in territorial waters. In *Moragne*, the Court specifically noted that the maritime law of the United States could change by common acceptance among the states of a policy permitting recovery for wrongful death, which then becomes a part of American jurisprudence. *Id.* 398 U.S. at 390. Similarly, in the spirit of *Moragne*, a survival cause of action must be acknowledged under general maritime common law since the majority of states permit some kind of survival actions. *Miles*, 498 U.S. at 33-35; Keeton, Prosser and Keeton on Torts at 126; Restatement 2d of Torts at 924, 926.[8]

Following *Moragne*, many federal circuit and district courts relied on its rationale to hold that the general maritime law encompassed a general maritime survival action, one that permitted recovery for conscious pain

[8] In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284 (1980), the Court also acknowledged that the currently prevailing views about compensation for an element of damages (there, the right of a spouse to recover for loss of consortium for personal injury to her husband), evidenced by a majority of the states permitting such recovery, could change prior rejection of such damages under general maritime law to acceptance (rejecting the prior disallowance of loss of consortium damages in *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257 (Ca.2d 1963), *cert. denied* 376 U.S. 949 (1964)).

and suffering and other claims for monetary damages which survive the death of the injured person. *See, e.g., Preston v. Frantz*, 11 F.3d 357 (2nd Cir. 1993); *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 23[9] (2nd Cir. 1994), *rev'd in part on other grnds.*, 516 U.S. 217 (1996); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 166 (4th Cir. 1972); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *Miles, supra*, 882 F.2d at 985-987; *Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 623-624 (5th Cir. 1981); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 479-480 (N.D. Cal. 1987); *Kuntz, supra*, 573 F. Supp. at 1284; *Chute, supra*, 466 F. Supp. at 69-70; *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992); *Rye v. U. S. Steel Mining Co., Inc.*, 856 F. Supp. 274, 279 (E.D. Va. 1994); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151, 1156 (S.D. Fla. 1992); *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371 (11th Cir. 1997), *cert. pending* Docket No. 97-1209; *Newhouse v. United States*, 844 F. Supp. 1389, 1393 (D.Nev. 1994). *See also*, George and Moore, *Wrongful Death and Survival Actions under the General Maritime Law: Pre-Harrisburg through Post-Moragne*, 4 J. Mar. L. and Comm. 1, 13 (1972) ("It would be anomolous to hold that admiralty did not recognize the survival of actions when the historical basis for denying a cause of action for wrongful

[9] The Second Circuit *Zicherman* decision held that federal maritime law supplied the measure of damages but did not specifically apply it to the pain and suffering claim as KAL had not challenged the legal basis to assert the claim on appeal.

death, rejected an inappropriate for continuing the rule of *The Harrisburg*, is the same as that for survival actions." (footnote omitted)).

The general maritime survival cause of action is distinct from, and ungoverned by, any wrongful death remedy, whether the death remedy is DOHSA, the Jones Act (46 U.S.C. App. § 688 *et seq.*), or a *Moragne* cause of action. Legislative enactments broadening the policy judgment that personal injury actions should be continued by the injured person's personal representative have eroded the historical basis for disallowance of such actions. The Court should squarely hold that the general maritime law permits an action for personal injuries to a non-seafarer injured by wrongful act on the high seas for losses suffered during the decedent's lifetime, and that such an action survives after his death and may be maintained by his personal representative.

Since the rule of law announced by the Court will affect the rights of all non-seafarers injured on the high seas, the Court must consider fact patterns beyond that presented in Petitioners' case in defining the scope of the general maritime law survival action. The Court has noted that the Jones Act and many states provide survival remedies for the losses suffered during the decedent's lifetime. *Miles, supra,* 498 U.S. at 35. Those losses would include pain, suffering, and disfigurement; medical expenses; and lost wages from the date of injury to the date of death. Thus, although Petitioners can only recover for the decedents' pre-death pain and suffering, many others will sustain out-of-pocket losses that are governed by this ruling.

The District of Columbia Circuit found the contours of petitioner's proposed survival action uncertain. *Dooley, supra,* 117 F.3d at 1482. It assumed that the survival cause of action would permit the decedent's estate to recover for the decedent's pre-death injuries. *Id.* Exactly! However, the estate is not a wrongful death beneficiary; rather, the estate is the holder of the survival cause of action to be distributed to whomever the beneficiaries are under the laws of the state in which the estate is probated. While the persons themselves may be the same as may recover under the death action, *e.g.* spouse, children or parents, they are recovering figurative apples under the death action, and oranges under the survival action. The death action beneficiaries recover for their own losses occasioned by the death. If any family members obtain any portion of the estate recovery, it is only because the applicable state intestacy statute permits the decedent's recovery to pass through to that category of persons (e.g. spouse, child) after the decedent's death, just as do the decedent's other assets.

II. CONGRESS DID NOT INTEND TO PRECLUDE SURVIVAL ACTION REMEDIES WHEN IT ENACTED DOHSA

A. DOHSA Does Not Preclude or Eliminate Survivorship Actions.

DOHSA is a wrongful death statute and contains no survival provision. *Gaudet, supra,* 414 U.S. at 575-76, 575

n.2. The absence of a survival provision leaves a legislative void which, in turn, allows the general maritime law survival action to coexist with the wrongful death remedies under DOHSA. This precept has been accepted in cases in which the death action was governed by DOHSA by the Eleventh Circuit (*Gray, supra,* 125 F.3d at 1381-1386), by the First Circuit (*Barbe, supra,* 507 F.2d at 799-800), by the Fifth Circuit (*Azzopardi, supra,* 742 F.2d at 893-894; *Law, supra,* 523 F.2d at 795), and by the Second Circuit (*Zicherman, supra,* 43 F.3d at 23; *Preston, supra.* 11 F.3d at 358). It has also been accepted in the context of a *Moragne* death action by the Eighth Circuit, *Spiller, supra,* 466 F.2d at 909-10; by the Fourth Circuit, *Greene, supra,* 466 F.2d at 163-167; by the Fifth Circuit, *Dennis, supra,* 453 F.2d at 140-141; and by the Sixth Circuit, *Anderson, supra,* 894 F.2d at 813-814. Only the Ninth Circuit[10] and District of Columbia Circuit have rejected the precept. *Saavedra v. Korean Air Lines Co., Ltd.,* 93 F.3d 547 (9th Cir. 1996); *Dooley v. Korean Air Lines Co., Ltd.* (*In re Korean Air Lines Disaster of Sept. 1, 1983*), 117 F.3d 1477 (D.C. Cir. 1997).

Whether a general maritime law survival remedy can be asserted in conjunction with a DOHSA death action turns on whether, in enacting DOHSA, Congress intended to bar survival remedies. In interpreting a Congressional statute, it is imperative for the Courts to identify Congress' intent and to give it effect by examining

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[10] Prior to the recent *Saavedra* decision, the Ninth Circuit had held that a survival cause of action existed for pre-death pain and suffering which could be brought in conjunction with a *Moragne* general maritime law wrongful death action. *Evich v. Connelly,* 759 F.2d 1432, 1434 (9th Cir. 1985).

the ordinary meaning of the language that Congress employed. *Park 'N Fly Inc. v. Dollar Park and Fly, Inc.* 469 U.S. 189 (1985); *United States v. Turkette,* 452 U.S. 576 (1981) quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102 (1980). As many courts have found, there is no specific reference in DOHSA to "survival actions" or "survival remedies." *Gray, supra,* 125 F.3d at 1383; *Kuntz, supra,* 573 F. Supp. at 1285; *Azzopardi, supra,* 742 F.2d at 894. This Court has acknowledged that DOHSA does not contain survival provisions. *Gaudet, supra,* 414 U.S. at 575, n.2.

Since Congress was silent on the issue of survival remedies, other interpretative devices must be used to determine the scope of Congressional intent. Under this Court's general preemption analysis, there is a strong presumption *against* preempting other sources of remedies, be they state law or common law remedies. Only when there are explicit statements of preemption in the statutory language, or when the presumption is implicit because the statute's structure and purpose so thoroughly occupies the field that Congress has left no room for supplementation, should other remedies be barred. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992) (state common law remedies); *Hillsborough County, Fla. v. Automated Medical Lab., Inc.,* 471 U.S. 707, 716 (1985) (state regulations); *California v. ARC America Corp.,* 490 U.S. 93, 101 (1989) (state anti-trust law).

As Chief Justice Chase, sitting on the Circuit in *The Sea Gull,* 21 F. Cas. 909, 910 (No. 12, 578) (C.C.D.Md. 1868) said in the maritime context:

> . . . certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, *when not required to withhold it by established and inflexible rules.* (emphasis supplied)

This Court has also held that there appears no intention by Congress that DOHSA have any effect in "foreclosing non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Moragne, supra,* 398 U.S. at 400; *Gaudet, supra,* 414 U.S. at 588, n. 22; *American Export Lines Inc. v. Alvez,* 446 U.S. 274, 285 (1980).

Thus, unless the language of DOHSA or its legislative history clearly indicates that Congress had an "established and inflexible" intent to preclude a survival action claim, it cannot be barred.

B. The History of DOHSA Does Not Support Preemption.

The possible preemptive effect of DOHSA must be viewed in light of the historical precedent leading to its passage. The common law of England arguably did not permit a common law action for wrongful death. *Moragne, supra,* 398 U.S. at 382. In 1886, this Court held that admiralty afforded no remedy for wrongful death in the absence of an applicable federal or state statute. *The Harrisburg,* 119 U.S. 199 (1886). After *The Harrisburg,* wrongful death actions in the maritime context had to rely on state wrongful death statutes, e.g. *The Hamilton* 207 U.S. 398 (1907); *The Tungus v. Skovgaard,* 358 U.S. 588

(1959) (death of a non-seaman in territorial waters); *Hess v. United States,* 361 U.S. 314 (1960) (same).

In 1920, Congress passed two statutes to ameliorate the harsh rule of *The Harrisburg*. The first was the Death on the High Seas Act. Two months later, Congress passed a comprehensive measure dealing with many facets of the maritime industry known as the Merchant Marine Act of 1920. Ch. 250, 41 Stat. 988. Embedded in its many provisions was Section 33, Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. App. § 688 (1988 ed.) which incorporated by reference the Federal Employer's Liability Act (FELA), 35 Stat. 65 (1908), as amended 46 U.S.C. §§ 51-60 (1988 ed.). The Jones Act extended to any "seaman" the same statutory remedies for injuries that were available to railroad workers. The coverage of the Jones Act extended to all navigable waters. DOHSA's coverage was limited to recovery of damages resulting from "wrongful act, neglect or default" occurring more than a marine league from shore. § 1, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1988 ed.).

The legislative history clearly shows that DOHSA's enactment was to rectify the harshness of the rule in *The Harrisburg* so that there was some *wrongful death* remedy available for accidents occurring on the high seas. Representative Volstead, who sponsored the bill stated its purpose as follows:

> The object of this bill is to give a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas. Nearly all countries have modified the old rule which did not allow relief in the case of death under such circumstances. Under what is known as

> Lord Campbell's Act[11], England, many years ago, authorized recovery in such cases. France, Germany, and other European countries now follow this more humane and enlightened policy and allow dependent parties to recover in case of death of their near relatives upon the high seas.

Congressional Record, 66th Congress, Volume 59, Page 4402.

Representative Volstead's comments relate to a death action, dependents, beneficiaries, and Lord Campbell's Act (a wrongful death statute), not to any survival remedies, *see*, *Gray, supra*, 125 F.2d at 1384, since survival actions do not address issues such as dependents and beneficiaries. *Id.*

This Court has previously commented that the legislative histories of DOHSA and the Jones Act are not models of considered legislative judgment. *American Export Lines, Inc., supra*, 446 U.S. at 283. One commentator has opined that little can be gleaned about the intent of Congress in the legislative history of DOHSA and the Jones Act as there were no clear guidelines established by Congress of its cohesive purpose in enacting the legislation. Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 Colum. L.R. 648, 654 (1964) (hereinafter "Day"). Mr. Day points out that the enormous and diverse workload of the 1920 Congress prevented it from careful consideration or lengthy discussion of how each section of the intricate statutes could affect the similarly complex law of admiralty. *Id.*

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[11] *See*, fn. 6, *supra*.

Another commentator, who describes himself as the drafter of much of the language of DOHSA, acknowledges that he understood the distinction between survival actions and death actions and that, in his opinion, DOHSA is only a death action. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 116, 120 (1921). Thus, there is nothing in either DOHSA itself or the history back to its passage to suggest that Congress meant to deal with, let alone eliminate, survival actions.

C. Subsequent Amendment Replacing § 763 with § 763a Acknowledges Congress' Approval of Survival Actions Coexisting with DOHSA Death Actions.

In 1980, Congress amended DOHSA to repeal § 763 and enact § 763a which provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, ***or both***, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

Oct. 6, 1980, P.L. 96-382, § 1, 94 Stat. 1525 (emphasis added).

The prior limitation section, 46 U.S.C. § 763, provided:

> Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction on the vessel, person, or corporation sought to be charged, but after expiration of such period

> of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

March 30, 1920, C.111, § 3, 41 Stat. 537.

The 1980 amendment changed several substantive provisions of its predecessor. First, it changed the time from which the statute began to run from the date of the wrongful act, neglect or default to the date the cause of action accrues. The cause of action for wrongful death usually accrues as of the date of death no matter how long a time has elapsed from the date of injury. *See*, Speiser Krause & Madole, *Recovery for Wrongful Death*, 3d § 11:10, 11:12 (1992). The amendment thus aligned DOHSA with the majority of other wrongful death statutes which begin the running of the statute of limitations at the date of death since the cause of action belongs to the survivors and does not accrue until the death occurs.

Second, the 1980 amendment broadened the statute of limitations to extend to actions for "personal injury or death, *or both*" and made the period for both three years. (emphasis supplied). The clear language of the provision contemplates that there can be two actions, one for personal injuries (which survive after the death) and one for wrongful death, which can be brought concurrently, i.e. "both," as long as they are brought within the time restrictions. Statutes must be construed to avoid assuming that Congress includes language in a statute that is purely surplusage. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). It is difficult to identify a purpose for the "or both" language other than a recognition that both

survival and death actions may be maintained simultaneously. Because 46 U.S.C. § 763a also extended the statute of limitations to cover all maritime torts, it might be argued to encompass only non-DOHSA survival actions. However, the argument must fail because § 763a was enacted as part of *DOHSA*. The only rational inference is there is no Congressional policy to preclude the survival of actions for personal injuries which may be brought concurrently with a DOHSA death action. In addition, *Spiller, supra*, 466 F.2d at 909; *Barbe, supra*, 507 F.2d at 799-800; and *Law, supra*, 523 F.2d at 795, each of which was decided before the 1980 amendment, recognized maritime survival actions. Therefore, the 1980 Congress' approval of survival actions for personal injury to be maintained alongside DOHSA death actions may have resulted from Congress' cognizance of, and is surely consisted with, the development, of the general maritime survival action akin to the *Moragne* wrongful death action.

D. The Reference to an Action Surviving in 46 U.S.C. § 765 Does Not Preclude a General Maritime Law Survival Action.

The D.C. Circuit relied upon 46 U.S.C. § 765 (App. 3a-4a), which has remained unchanged since 1920, as support for the argument that DOHSA created a limited survival provision. The D.C. Circuit considered § 765 to be an expression of legislative judgment on the extent to which survival actions were to be permitted by Congress under DOHSA. *Dooley, supra*, 117 F.3d at 1482. Other courts and commentators have disagreed. *See, e.g., Gray, supra*, 125 F.3d at 1383-84; *Bodden v. American Offshore,*

Inc., 681 F.2d 319, 331-32 (5th Cir. 1982); *Kuntz, supra*, 573 F. Supp. 1285; Hughes, *supra*, 31 Yale L.J. at 126; Maraist, *Admiralty Jurisdiction: Developments in the Law, 1983-84*, 45 La. L. Rev. 179, 196 (1984) (Section 765 is a "non-abatement" and "conversion" statute that permits, if a victim files suit and then dies of his injuries, his representatives may proceed with wrongful death damages under DOHSA).

The better interpretation of § 765 is that it is a grant of permission ("*may* be substituted as a party and the suit *may* proceed . . . " (emphasis added.)) for the beneficiaries to continue the injured party's original suit as a wrongful death remedy if the death occurred after the expiration of the statute of limitations contained in the Act (originally, two years from the date of the wrongful act). *Gray, supra* at 1383-84; *Kuntz, supra*, 573 F. Supp. at 1285. The section is permissive but does not *require* the personal representative to elect to proceed under DOHSA and abandon any survival action that was available under applicable statutes or general maritime law.

The interpretation that § 765 is a permissive means of ensuring the survival of the wrongful death remedy when death occurs after DOHSA's statute of limitations has expired comports with the understanding of one of the primary drafters, Mr. Robert M. Hughes. In his 1921 law review article, Mr. Hughes notes that the drafters of DOHSA set the date from which to begin the running of the statute of limitations as the date of the wrongful act rather than, as was more typical, the date of the death. Hughes, *supra*, at 126. If the injured person survived past the two year statute of limitations from the date of the wrongful act, his beneficiaries would lose the right to

pursue a death action but for § 765, which enabled the badly injured person to preserve the DOHSA action by suit during his lifetime.

It is also significant that § 765 says that, in the event of the death of the person injured, the suit may be maintained by the personal representative as an action under the Act for recovery of compensation provided by 46 U.S.C. § 762, which clearly relates to wrongful death beneficiaries and compensation for losses to survivors of a decedent in a wrongful death action, rather than for the injured person's personal injuries.

E. The Existence of a Survival Action Remedy in the Jones Act Does Not Imply that Congress Deliberately Excluded a Survival Action Remedy under General Maritime Law with a DOHSA Death Action.

The D.C. Circuit also found it significant in its denial of survival action damages that, at about the same time DOHSA was enacted, Congress enacted the Jones Act which includes a survival provision. *Dooley, supra*, 117 F.3d at 1481-1482. But the lower court's emphasis on the Jones Act is unwarranted.

Although the Jones Act was passed by the same 1920 Congress as passed DOHSA, it was just one section of a comprehensive legislation dealing with numerous maritime measures. Day, *supra*, at 652. It incorporated by reference the Federal Employers Liability Act [FELA] wholesale as the body of law to be applied to seamen in suits for negligence against their employers. The legislative histories of neither statute explains why a survival

action remedy was included in the Jones Act but not in DOHSA, but several courts and commentators view the incongruity **not** as considered judgment of Congress, but as a function of Congress' expediency in adopting FELA wholesale into the Jones Act without careful consideration of each and every provision. *See, e.g., Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1390 (3rd Cir. 1971) (recognizing that the Jones Act survival remedy is only derivative, arising from a wholesale imputation of FELA); Day, *supra*, 64 Colum. L.R. at 654 ("It is probable that the survivors of seamen were entitled to that remedy [a survival action] not as the result of conscious decision but rather because of its fortuitous inclusion in the FELA.") It also made sense for Congress to legislate comprehensively for seamen in the Jones Act, but not to attempt to do so for non-seafarers who might be injured and eventually die from the injuries sustained on the high seas.

F. This Court has Never Interpreted DOHSA to Preclude a General Maritime Law Survival Action.

The D.C. Circuit relied on the Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) to suggest that DOHSA precludes the use of a general maritime law survival action to supplement the recovery allowed under DOHSA. But *Higginbotham* involved *only* the question of whether non-pecuniary damages for loss of society (traditionally, a loss to the survivors which is clearly a measure of damages in a wrongful death action) could be recovered in the *death action* under DOHSA by the overlay of general maritime law. The Court, speaking only to remedies available in the death action, held that

statutory damages recoverable under DOHSA could not be supplemented by general maritime law to provide a recovery for loss of society. The Court also noted that DOHSA does not address every element of wrongful death law, *id.*, clearly defining DOHSA as a death act. *Higginbotham, supra*, 436 U.S. at 625. *See also, Miles, supra*, 498 U.S. at 31, in which the Court confirmed that *Higgenbotham* held that DOHSA limits recoveries in *wrongful death suits*. (emphasis added).

The other Courts of Appeal and lower courts addressing the issue after *Higginbotham* have limited its holding to the wrongful death action, concluding that the limitations in DOHSA for death actions have no effect on a survival action even though both sets of injuries arise from the same tortious act. *Barbe, supra*, 507 F.2d at 800. ("[Acknowledging a general maritime survival action] also avoids a conflict with DOHSA, since survival and wrongful death actions have long been recognized as distinct causes of action." (citations omitted)); *Azzopardi, supra*, 742 F.2d at 893; *Kuntz, supra*, 573 F. Supp. at 1285; *Chute, supra*, 466 F. Supp. at 69; *McAleer, supra*, 791 F. Supp. at 926-27; *Gray, supra*, 880 F. Supp. at 1569; *Rye, supra*, 856 F. Supp. at 279.

Since DOHSA does not address a survival action for pre-death pain and suffering, it leaves a gap in the coverage provided by DOHSA. As Justice Stevens pointed out in *Higginbotham, supra*, 436 U.S. at 625, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Because DOHSA is a wrongful death statute and not a survival statute, the maritime law is free to fill what otherwise would be a legislative void

by creating a federal survival action which would apply to injuries sustained by persons who subsequently die from the tortious conduct occuring on the high seas. *See, e.g. Barbe, supra,* 507 F.2d at 799-800; *Chute, supra,* 466 F. Supp. at 69; *Azzopardi, supra,* 742 F.2d at 893.

Subsequent to *Higginbotham,* the Court addressed some of the issues relating to the general maritime survival cause of action in *Miles, supra,* 882 F.2d 976, an action brought under the Jones Act and general maritime law. In *Miles,* the mother of a deceased seaman claimed a recovery under the Jones Act in negligence and under a general maritime *Moragne* death action for unseaworthiness. The Court held that both actions could be maintained simultaneously. *Miles, supra,* 498 U.S. at 30.

The seaman's mother also brought a survival cause of action under general maritime law on behalf of the estate for the seaman's lost future earnings. The Fifth Circuit held that the general maritime law did not create a cause of action for loss of future wages, but upheld the award of loss of support and services to the mother and to the estate for pre-death pain and suffering under the negligence (Jones Act) cause of action.

This Court then had to determine "in a general maritime action surviving the death of a seaman" what damages were recoverable. The Court noted that Congress and the States have changed the traditional maritime law that a seaman's personal cause of action does not survive his death by statutorily providing that right of action for injuries survives to the decedent's personal representative. *Miles, supra,* 498 U.S. at 33.

Miles acknowledged that many lower courts had concluded that the general maritime law prohibiting survival actions had been changed by the widespread adoption of survival statutes in analogous state and federal legislation, underlying a policy judgment in favor of survival akin to that in the death context in *Moragne. Id.* 498 U.S. at 34. However, as there was clearly a right to recover for the seaman's pre-death pain and suffering under the Jones Act, the only element of damages specifically to be addressed by the Court under the general maritime law was a right to recover for lost future wages. The Court denied the loss of earnings recovery by noting that only a few states permitted a recovery in a survival action for lost future earnings. *Id.* 498 U.S. at 35. This notation was by way of comparison with the kind of "wholesale" and "unanimous" policy judgment permitting recoveries for wrongful death that was in effect in the states of the United States that had prompted the Court to create the new cause of action in *Moragne. Id.* 498 U.S. at 34. The Court reasoned that, since the considered judgment of a large majority of American legislatures was to preclude recovery for loss of future income in a survival action, that recovery as a measure of damages had not become the general law of the United States and, if adopted, would be a strictly minority view. The Court also noted that the Jones Act survival action was statutory and the Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. *Miles, supra,* 498 U.S. at 56, *citing* 45 U.S.C. § 59 [45 U.S.C.S. § 59]. Since, in Jones Act cases, the survival action was

statutory, its elements could not be broadened by general maritime law.

In declining to adopt the minority view permitting recovery of lost future wages, the Court opined that, absent the statutory parameters of the survival action in the Jones Act/FELA, it would not necessarily be deterred from adopting the better rule of law even if it was a minority view inasmuch as there are strong policy arguments in favor of the remedy. *Id.* 498 U.S. at 35-36. Similarly there are strong policy arguments in favor of a survival action remedy encompassing damages for pre-death pain and suffering, medical expenses, and lost wages during the decedent's lifetime. *See*, § III, *infra*, at 40-42. Since there are no statutory parameters which define the scope of the general maritime law survival action, the Court must fill the gap left by Congress and permit recovery for an injured person's lifetime damages.

This Court has also noted that DOHSA has not been interpreted to bar a wrongful death recovery where the decedent had already recovered for his personal injuries during his lifetime, *Gaudet, supra*, 414 U.S. at 583, n. 10, thus implying there is a general maritime recovery for personal injuries separate from a subsequent death action.

Although footnote 10 in *Gaudet* did not reference case authority, the Fifth Circuit squarely addressed the issue in *Bodden v. American Offshore, Inc.*, 681 F.2d 319 (5th Cir. 1982). In *Bodden*, a seaman sustained serious injury in an engine room explosion on the high seas for which he filed suit and received a settlement in the year of his injury. Three years later, he committed suicide allegedly because

of the pain associated with the injuries. His widow brought a wrongful death suit based on unseaworthiness under DOHSA. The Fifth Circuit affirmed the lower court's allowance of the death action by determining that, unless DOHSA and its legislative history evidenced an established and inflexible intent to preclude the death action because of the recovery under the personal injury action, the historical flexibility of maritime law to give, rather than withhold, a remedy would permit the death action. If Congress had addressed the personal injury action in its contemplation of DOHSA, the death action would be barred. If Congress did not address recoveries for personal injuries prior to death in DOHSA, the personal injury action would be separate and independent and its settlement would not effect the vitality of the death action.

The Fifth Circuit in *Bodden* analyzed the relevant sections of DOHSA and concluded that Congress did not intend to address, nor did it address, the two causes of action. Congress' intent, rather than speaking to survival actions, was to fill a narrow statutory void, i.e. for deaths that occur on the high seas. Congress' narrow allowance of the death action should not block the evolution of general maritime law in areas in which Congress did not speak, as for personal injuries prior to death. *Id.* 681 F.2d at 332.

The only rational reading of footnote 10 in *Gaudet* is that survival actions are independent of DOHSA's wrongful death recoveries and may be maintained by the decedent prior to his death or by his personal representative if he dies of his injuries before the personal injury action is resolved.

III. THERE ARE STRONG POLICY REASONS TO ACKNOWLEDGE A SURVIVAL CAUSE OF ACTION TO PREVENT UNFAIRNESS AND INEQUITY

The Warsaw Convention was intended to insure compensation to passengers injured or killed during international air transportation, albeit with a monetary limit for ordinary negligence. *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 37 F.3d 804, 829 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). With the *Zicherman* direction that Warsaw is merely a pass-through with respect to damages law, the substantive law must come from another source. That source is general maritime law for the survival action. General maritime law embodies not only claims for injuries to airline passengers whose injuries, while of the most severe nature, are often of limited duration, but also claims by all non-seafarers injured by wrongful act on the high seas. Injuries so sustained can result in lingering effects which last weeks, months, or years before they finally end in death.[12] Hundreds, if not thousands, of people a year – oil rig workers injured enroute over the high seas in helicopter accidents, airline passengers, passengers on cruise ships[13] or ferries, and the like – who are injured by wrongful acts upon the high

[12] Note, for example, the facts of the accidents in *Gaudet, supra*, and *Bodden, supra*, Mr. Gaudet survived many months before he died, long enough to settle his personal injury claim and Mr. Bodden survived three years before he died.

[13] DOHSA has been held applicable to cruise ship passengers. *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527 (9th Cir. 1994); *Moyer v. Klosters Rederi*, 645 F. Supp. 620 (S.D. Fla. 1986); *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990).

seas would be denied recovery for serious and severe injury and impairment of well-being if a survival action is denied. Consider, for example, a passenger on a ferryboat injured by severe burns in an engine room explosion on the high seas enroute from Los Angeles to Catalina Island[14] 26 miles away, who then lingers for months or years in the most excruciating pain before finally succumbing to death. If he has no dependents, or if he is incapable of resolving an action for his injuries before his death, he goes uncompensated if there is no general maritime law survival action. If that is the result, then the wrongdoer would be motivated to prolong the personal injury litigation for years in the hopes of the injured person's demise and, with it, the demise of the wrongdoer's legal impunity.

Most states in the United States provide survival actions to compensate the injured party for his lifetime damages. *Miles, supra*, 498 U.S. at 33-34. Daily in American courts, judges and juries are asked to evaluate predeath injuries in common automobile accident and medical malpractice cases. The courts are able to prevent double recoveries and to monitor allowable damages to preclude unreasonable results.

This Court has always acknowledged the special solitude given to those who brave the seas. *Moragne, supra*, 398 U.S. at 387. The Court has also applied maritime precepts to non- seafarers who are injured or killed on or

[14] Or, for another example, a ferry from Connecticut to Nantucket Island. *See, Preston, supra*.

over the seas where the activity is one that would traditionally have been conducted by water craft regardless of the lack of their conscious assumption of the risks of the sea. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249 (1972); *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986).

Seamen *voluntarily* undertake the rigors and hazards of life on the sea. Airplane passengers and other non-seafarers have imposed upon them maritime's body of law even though they do not voluntarily elect its provisions, yet they are still exposed to maritime hazards which result in injuries and death. Since the Court has imposed maritime precepts on non-seafarers, it should strive to make uniform the remedies, especially inasmuch as a general maritime survival action does not intrude on the coverage provided by DOHSA.

IV

CONCLUSION

For all of the foregoing reasons, the Court of Appeals erred in prohibiting general maritime law survival causes of action to be maintained by Petitioners. Accordingly, the judgment of the Court of Appeals should be reversed and the actions remanded to the District Court for further proceedings to permit Petitioners to pursue wrongful death actions under DOHSA and general maritime survival actions.

Dated: February 19, 1998

Respectfully Submitted,

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APPENDIX

Relevant Provisions of the Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020.

Article 25(1)

1. The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct. 49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of Action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the territories or dependencies of the United States', the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 763. Prior Limitation Section [Repealed]

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction on the vessel, person, or corporation

sought to be charged, but after expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

§ 763(a). Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in

respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory Negligence

In suits under this Act [46 USCS Appx §§ 761 et seq.] the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

[illegible], ET AL.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

[illegible] CERTIORARI TO THE UNITED STATES [illegible] FOR THE [illegible] OF COLUMBIA CIRCUIT

[illegible] RESPONDENT [illegible] CO., LTD.

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether, in light of *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the pecuniary damage standard of the Death on the High Seas Act, 46 U.S.C. app. § 761 *et seq.*, may be supplemented with nonpecuniary damages for pre-death pain and suffering on the basis of general maritime law?

LIST OF ALL PARTIES AND RULE 29.6 LISTING

A. Petitioners

The Petitioners are (1) Philomena Dooley, personal representative of the estate of Cecelio Chuapoco, (2) Carl Cole, personal representative of the estate of Woon Kwang Siow and (3) Kimberly S. Saavedra, personal representative of the estate of Jan Hjalmarrson, who were the plaintiffs-appellants in the Court of Appeals. The action by Robert Boyar, executor of the estates of Michael Truppin and Jan Moline, which was part of the consolidated appeal below, has now been settled and no longer is involved.

B. Respondent

The Respondent is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Korea Co., Ltd.
Hanjin Construction Co., Ltd.
Hanjin Engineering & Construction Co., Ltd.
Hanjin Heavy Industry Co., Ltd.
Hanjin Information System & Telecommunications Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Leisure Co., Ltd.
Hanjin Shipping Co., Ltd.
Hanjin Transportation Co., Ltd.
Hanjin Travel Service Co., Ltd.
Inha General Hospital
Inha University Foundation

Jedong Industries Ltd.
Jungsuk Enterprise Co., Ltd.
Jungsuk Foundation (Hankuk Aviation College)
Kal Development Co., Ltd.
Keoyang Shipping Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Tacoma Marine Industries Ltd.
Korean French Banking Corporation Sogeko
Oriental Fire & Marine Insurance Co., Ltd.
Pyunghae Mining Development Co., Ltd.

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OPINIONS BELOW AND JURISDICTION

Respondent KOREAN AIR LINES CO., LTD. ("KAL") is satisfied with Petitioners' statement of the citation of the opinions and orders of the courts below and the basis for jurisdiction in the Court. Petitioners' Brief on the Merits ("Petitioners' Brief") at 1-2.

STATUTORY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. app. § 761 *et seq.* ("DOHSA"). The pertinent provisions of DOHSA are set forth in the Appendix hereto at RA 1. References preceded by "RA" refer to pages in the Appendix hereto.

STATEMENT OF THE CASE

A. Nature of the Case

This litigation arises from the crash in international waters of KAL flight KE007 on September 1, 1983, when Soviet military aircraft shot down flight KE007 while en route to Seoul, South Korea from Anchorage, Alaska. All 269 persons on board the aircraft were killed. The case previously was before the Court on two occasions. *See Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989).

The case at this stage involves only the legal question whether nonpecuniary damages for pre-death pain and suffering are recoverable under the applicable law of the United States for the deaths of three passengers on KAL flight KE007. The deaths of the decedents involved occurred on the high seas within the meaning of DOHSA, during the course of international transportation by air within the meaning of the Warsaw Convention.[1] Petitioners seek to recovery pecuniary

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No.

and nonpecuniary damages on behalf of the estates of the three deceased passengers and various surviving relatives.

B. The Proceedings in the District Court

1. The Pre-*Zicherman* Rulings of the District Court

In 1993, following the conclusion of the multidistrict liability proceedings,[2] KAL moved in 24 individual cases, pending in the district court and awaiting damage trials, for a determination, *inter alia*, that the types of recoverable damages are governed exclusively by DOHSA and that Petitioners, therefore, were not entitled to recover any nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. *See* 46 U.S.C. app. § 762 (RA 1). By Memorandum Opinion and Order, filed April 8, 1993, the district court denied KAL's pre-trial motion. *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-2793 *et al.* (D.D.C. Apr. 8, 1993) (JA 58). The district court found that, although both DOHSA and the Warsaw Convention apply to these actions, DOHSA was not the exclusive remedy as to recoverable damages. (JA 59). The district court, therefore, allowed Petitioners to pursue the recovery of nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. *Id.* The district court based its decision on the notion that these types of nonpecuniary damages are recoverable under Article 17 of the Warsaw Convention as "damage sustained." *Id.*[3]

876 (1934) (reprinted in note following 49 U.S.C. § 40105) ("Warsaw Convention").

[2] The liability of KAL was determined in the context of multidistrict litigation proceedings in the district court below. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

[3] The district court, in four other actions that were tried subsequently, held that nonpecuniary damages for survivor's grief are not recoverable under the Warsaw Convention as a matter of law. *See Forman v. Korean Air Lines*, No. 83-3578 (D.D.C. June 6, 1995) (Memorandum Opinion and Order), *aff'd and rev'd in part*, 84 F.3d 446 (D.C.

2. The Decision of the Court in *Zicherman*

While the cases herein were pending and awaiting damage trials in the district court, the Court decided *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996)[4] and rejected the notion that any type of damages are recoverable directly under the Warsaw Convention as "damage sustained." *Zicherman*, 516 U.S. at 222-29. The Court explained that "damage sustained" in the context of Article 17 of the Convention refers to "legally cognizable harm" and that courts are to determine "legally cognizable harm" *only* by reference to the applicable domestic law under the forum's choice-of-law rules, pursuant to Article 24 of the Convention. *Id.* In *Zicherman*, as in these cases, the applicable domestic law is DOHSA. *Id.* at 230.

The Court in *Zicherman* also rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition" absent the Convention. *Id.* at 229. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.*

Cir.), *cert. denied*, 117 S. Ct. 582 (1996); *Oldham v. Korean Air Lines*, 1994 WL 725277 (D.D.C. Oct. 11, 1994), *aff'd and rev'd in part*, 127 F.3d 43 (D.C. Cir. 1997); *Ocampo v. Korean Air Lines*, 1994 WL 731569 (D.D.C. Sept. 16, 1994), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, 127 F.3d 43 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3492 (U.S. Mar. 9, 1998) (No. 97-1180); *Maikovich v. Korean Air Lines*, No. 83-3792 (D.D.C. Nov. 14, 1994) (Memorandum Opinion and Order), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, 127 F.3d 43 (D.C. Cir. 1997).

[4] The damage trials had been stayed by the district court pending the Court's decision in *Zicherman*.

The governing law in *Zicherman* was DOHSA, which permits recovery of pecuniary damages only. *Id.* at 229-30; 46 U.S.C. app. § 762 (RA 1). The Court stated that, where DOHSA applies, neither state law nor general maritime law can provide a basis for the recovery of nonpecuniary damages for loss of society (the only question before the Court in *Zicherman*). 516 U.S. at 229-31. The Court, therefore, concluded that nonpecuniary damages for loss of society were unavailable. *Id.* The Court, however, noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," as the question was not before the Court. *Id.* at 230 n.4.

3. The Post-*Zicherman* Decision of the District Court

Following the Court's decision in *Zicherman*, KAL moved the district court to dismiss all claims for nonpecuniary damages in those cases still awaiting damage trials. KAL argued that the holding and rationale of the Court in *Zicherman* precludes the recovery of any nonpecuniary damages, including pre-death pain and suffering damages. Petitioners argued that pre-death pain and suffering damages were recoverable pursuant to a general maritime law survival action, or under Korean law pursuant to § 764 of DOHSA.[5]

The district court granted KAL's motion and dismissed all claims for nonpecuniary damages finding that, in light of *Zicherman*, nonpecuniary damages no longer are recoverable in these cases. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) ("*In re KAL-DDC II*") (JA 77). The district court, following the teaching of *Zicherman*, conducted a choice of law analysis and concluded that United States law applied and that DOHSA supplies the applicable substantive United States damage law. *Id.* at 12-14

[5] Petitioners also argued that nonpecuniary damages for survivor's grief were recoverable under Korean law.

(JA 80-84). Next, the district court concluded that the rationale of *Zicherman* precludes the award of nonpecuniary damages for pre-death pain and suffering in a DOHSA case. *Id.* at 14 (JA 87-88). The district court held in this regard:

> [I]t appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles. . . . Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that the non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

Id. at 15 (JA 88) (footnote omitted).[6]

Petitioners appealed the decision of the district court, pursuant to 28 U.S.C. § 1292(b).

C. The Decision of the Court of Appeals Below

The Court of Appeals affirmed the decision of the district court. *In re Korean Air Lines Disaster of Sept. 1, 1983 ("Dooley")*, 117 F.3d 1477 (D.C. Cir. 1997) (JA 93). The Court of Appeals, following the decisions of the Court in *Zicherman* and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), held that nonpecuniary damages for pre-death pain and suffering may not be recovered for a death on the high seas. *Dooley*, 117 F.3d at 1481-83 (JA 100-06). The Court of Appeals rejected Petitioners' reliance on several pre-*Zicherman* decisions allowing DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering under general maritime law. Rather, the Court of Appeals properly adopted the post-*Zicherman* conclusion of the Ninth Circuit

[6] The district court found Petitioners' argument that nonpecuniary damages for pre-death pain and suffering are recoverable under Korean law to be "irrelevant" because the court had determined that United States law governed the question of recoverable damages. *Id.* at 14 n.2 (JA 85).

in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 549-51 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996), and held that pre-death pain and suffering damages are not recoverable in an action governed by DOHSA. *Dooley*, 117 F.3d at 1481 (JA 100).

The Court of Appeals reasoned that, even if general maritime law provides a survival action in some cases, *Higginbotham* instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. *Dooley*, 117 F.3d at 1481 (JA 101). Thus, the Court of Appeals found that Congress decided in DOHSA, who may sue, that recovery is restricted to pecuniary losses and that "[j]udge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it." *Id.* (JA 101).

The Court of Appeals also found that it was fair to assume that Congress, in enacting DOHSA, understood the difference between wrongful death and survival actions and noted that the inclusion of a survival remedy in the Jones Act, 46 U.S.C. app. § 688 (enacted two months after DOHSA), but not in DOHSA, "scarcely seems inadvertent." *Id.* at 1481 (JA 102). The Court of Appeals determined § 765 of DOHSA to be a limited survival provision and held that the fact that DOHSA "contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted." *Id.* at 1482 (JA 102).

The Court of Appeals concluded that, to allow a decedent's estate to recover compensation for the decedent's pre-death injuries, necessarily would expand the class of beneficiaries recognized by Congress in DOHSA and allow for the recovery of nonpecuniary damages precluded by DOHSA. *Id.* (JA 103). In this regard, the Court of Appeals properly rejected Petitioners' argument based on the distinction between wrongful death and survival action remedies:

> They [Petitioners] have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Id. at 1482-83 (JA 104-05).

Finally, the Court of Appeals rejected Petitioners' reliance on the law of South Korea as a basis for the recovery of pre-death pain and suffering damages. *Id.* at 1483-85 (JA 106-110). Petitioners do not dispute this ruling of the Court of Appeals.[7]

SUMMARY OF ARGUMENT

"This case involves death on the high seas. The question is whether, in addition to the damages authorized by federal statute, a decedent's survivors may also recover damages under general maritime law." *Higginbotham*, 436 U.S. at 618. The answer of the *Higginbotham* Court to this question was "no". The answer of district court and Court of Appeals below in these cases to this question also was "no". Petitioners now argue that the answer to this question should be "yes".

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[7] Similarly, in the Court of Appeals, Petitioners did not challenge the district court's choice of law analysis and conclusion that the applicable damage law, pursuant to the Warsaw Convention, was the law of the United States. *Id.* at 1484 (JA 107).

Petitioners reject the relevancy of *Higginbotham* and *Zicherman*, arguing that those cases are limited to "wrongful death" actions and do not restrict the Court's ability to create a general maritime law "survival action" for pre-death pain and suffering damages. Petitioners are wrong.

Applying the holding and rationale of the Court in *Zicherman* and *Higginbotham* the district court and the Court of Appeals below rejected Petitioners' arguments and concluded that, because DOHSA allows the recovery of pecuniary damages only, nonpecuniary damages for pre-death pain and suffering are not recoverable in a DOHSA case. The Court of Appeals found that DOHSA is exclusive and cannot be supplemented by general maritime law or otherwise.

In DOHSA, Congress expressly and plainly stated that an action for a death on the high seas must be maintained for the "exclusive benefit" of the designated beneficiaries, restricted recoverable damages to the "pecuniary loss sustained" by the designated beneficiaries and made clear that if the decedent dies during the pendency of a personal injury action, that action is subsumed in the exclusive DOHSA action. 49 U.S.C. app. §§ 761, 762, 765 (RA 1-2). Damages for the pre-death pain and suffering of a decedent are not a "pecuniary loss sustained" by the DOHSA beneficiaries and, therefore, are not recoverable in an action to which DOHSA applies.

Petitioners' argument that the Court may create a general maritime law survival action for nonpecuniary pre-death pain and suffering damages ignores the exclusive nature of DOHSA. When DOHSA was enacted in 1920 there was no general maritime law death action available for a death on the high seas. Therefore, in enacting DOHSA, Congress created an action that did not previously exist and an action that Congress determined was to be exclusive. Congress plainly limited recovery for all deaths occurring on the high seas to pecuniary losses and to the designated beneficiaries. Petitioners now seek to circumvent DOHSA by arguing a "gap"

exists that may be filled by judge-made general maritime law. There is no gap to be filled.

Certainly, when DOHSA was enacted, Congress knew the difference between wrongful death and survival actions. Nevertheless, in DOHSA, Congress did not provide for the recovery of a decedent's personal injuries other than to allow a pending personal injury action to continue after death under DOHSA. When Congress knows how to say something, but does not do so, its silence is controlling. As the Court of Appeals stated: "When Congress decides to go only so far it necessarily has decided to go no further." *Dooley*, 117 F.3d at 1482 (JA 102). To allow DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering would be rewriting the rules Congress plainly and expressly has set forth in DOHSA. The Court consistently has rejected all judicial attempts to supplement DOHSA and has adhered to the principle that:

> Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

Dooley, 117 F.3d at 1481 (JA 101); *see Zicherman*, 516 U.S. at 231; *Higginbotham*, 436 U.S. at 625.

The Court of Appeals below adhered to the language of DOHSA and the directions of the Court in *Zicherman* and *Higginbotham* and concluded that nonpecuniary damages for the pre-death pain and suffering are not recoverable. The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT NONPECUNIARY DAMAGES FOR PRE-DEATH PAIN AND SUFFERING ARE NOT RECOVERABLE IN AN ACTION GOVERNED BY DOHSA

Petitioners concede that, standing alone, DOHSA does not allow for the recovery of nonpecuniary pre-death pain and suffering damages. Petitioners' Brief at 19, 23, 35. Petitioners argue, nevertheless, that DOHSA is a wrongful death statute and not a survival statute and, therefore, Congress left the door open to judicial supplementation of the DOHSA prescribed pecuniary damages with nonpecuniary damages pursuant to general maritime law. Petitioners' Brief at 9-19, 23-29, 34-38. To achieve this supplementation, Petitioners argue that the Court should recognize a general maritime law survival action extending to the high seas so that a vast array of damages can be allowed, including pre-death pain and suffering, disfigurement, lost earnings and medical expenses. Petitioners' Brief at 12, 22.[8]

The Court of Appeals was correct in rejecting Petitioners' argument and in concluding that DOHSA provides the exclusive measure of damages for a death on the high seas, within the meaning of DOHSA, and that the pecuniary loss standard of DOHSA cannot be supplemented with any nonpecuniary damages under general maritime law.

[8] Petitioners' argument that the Court should also allow the recovery of damages for disfigurement, lost earnings and medical expenses, under a proposed general maritime law survival action, is improperly presented. Petitioners' Brief at 12, 22. This argument was neither presented nor ruled upon by the Court of Appeals or the district court below and cannot be fairly considered as being within the scope of the question presented in the Petition granted by the Court. *See* Sup. Ct. R. 24.1(a).

A. The DOHSA Damage Standard Is Exclusive and May Not Be Supplemented by General Maritime Law

While the Court in *Zicherman* stated that it need not consider the question whether the pecuniary loss limitation of DOHSA contradicts the allowance of pain and suffering damages, because the issue was not before the Court in *Zicherman*, it is clear that the awarding of such damages *does* contradict DOHSA. *Zicherman*, 516 U.S. at 230 n.4.

Under traditional general maritime law, as under the common law, there was no recognition of a cause of action for wrongful death or for the survival of personal injuries of a decedent.[9] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 381-86 (1970); *see The Harrisburg*, 119 U.S. 199, 213-14 (1886) (holding judge-made general maritime law did not afford a cause of action for wrongful death). With respect to the non-survival of a decedent's personal injury action, the rule was based on the traditional common law rule that a personal cause of action in tort did not survive the death of its possessor. *Moragne*, 398 U.S. at 385.

In 1920, Congress, recognizing that no general maritime cause of action was available for a death on the high seas, enacted DOHSA to change the common law rule against recovery and to provide a federal cause of action for all deaths as a result of an accident occurring on the high seas. *See Offshore Logistics Corp. v. Tallentire*, 477 U.S. 207, 230 (1986); *Higginbotham*, 436 U.S. at 620.[10] In DOHSA,

[9] As the terms traditionally have been defined, a "wrongful death" action is intended to compensate designated beneficiaries for the losses they have sustained as a result of a decedent's death and a "survival" action continues any action the decedent may have had for personal injuries prior to death.

[10] But not in the territorial waters. As to supplementation by state statutes, "[t]he general understanding was that the statutes of the coastal States, which provided remedies for deaths within territorial waters, did not apply beyond state boundaries" and, in any event, such statutes are

Congress set forth a comprehensive scheme for all actions involving deaths occurring on the high seas: (1) § 761 establishes the cause of action and the beneficiaries; (2) § 762 restricts the recoverable damages to the "pecuniary loss" sustained by the designated beneficiaries; (3) § 763 sets forth a two year period of limitations;[11] (4) § 765 allows for the survival of a personal action filed by the victim prior to death to continue as an action under DOHSA if the victim dies during the pendency of the action; and (5) § 766 provides that contributory negligence of the decedent will not bar a recovery.[12] 46 U.S.C. app. §§ 761-66 (RA 1-3).

Notwithstanding the comprehensive nature of the DOHSA action, Petitioners argue that Congress left a gap in DOHSA that can be supplemented with nonpecuniary damages under general maritime law.

As the Court of Appeals and district court below correctly concluded, *Zicherman* and prior decisions of the Court establish that DOHSA has prescribed a comprehensive tort recovery regime and, where Congress has thus spoken, there can be no recovery other than as recognized and allowed by the Act of Congress. *Dooley*, 117 F.3d at 1481 (JA 101); *In re KAL-DDC II*, 935 F. Supp. at 15 (JA 88); *see Zicherman*, 516 U.S. at 229-31; *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 215 (1996); *Miles*, 498 U.S. at 31-33; *Tallentire*, 477 U.S. at 207; *Higginbotham*, 436 U.S. at 624-25. For this reason, the Court has held consistently that where DOHSA applies, neither state law nor general maritime law can pro-

preempted by DOHSA. *Moragne*, 398 U.S. at 393 n.10; *see Tallentire*, 477 U.S. at 230-33.

[11] Section 763 was repealed in 1980 with the enactment of the Uniform Statute of Limitation for Maritime Torts which was codified at 46 U.S.C. app. § 763a. *See* discussion *infra* at 29-32.

[12] In addition, § 764 preserves rights under applicable foreign law and § 767 allows for concurrent jurisdiction in state courts and the preservation of state law to the territorial waters.

vide the basis for awarding what DOHSA does not allow—nonpecuniary damages. *Id.*[13]

In *Higginbotham*, the Court held that a general maritime law death action could not apply to a death on the high seas and expressly rejected the notion that there could be any supplementation of the DOHSA pecuniary damage restriction by nonpecuniary loss of society damages under such an action. The Court explained that where DOHSA addresses an issue, such as damages and beneficiaries:

> courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.
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> * * *
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> *Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements.* . . . In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

436 U.S. at 625 (citations omitted and emphasis added). Thus, DOHSA precluded the application of a general maritime law death action to a death occurring on the high seas within the meaning of DOHSA.

In *Tallentire*, the Court rejected the extension of a state wrongful death statute to the high seas and held that DOHSA may not be supplemented with nonpecuniary loss of society damages under a state wrongful death statute. 477 U.S. at 230-32. Thus, DOHSA precludes the application of a state

[13] Moreover, "[o]nce Congress has relied upon conditions that the courts have created" in enacting a statute (*i.e.*, no general maritime death action), courts "are not as free as [they] would otherwise be to change them." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273 (1979) ("we should stay our hand in these circumstances . . . .").

death statute to a death occurring on the high seas within the meaning of DOHSA.

In *Miles*, the Court again reaffirmed the supremacy of maritime Acts of Congress. 498 U.S. at 32. While the Court in *Miles* held that a seaman's survivors could pursue a general maritime law wrongful death action, alleging unseaworthiness, in addition to a Jones Act[14] negligence claim, the Court restricted the extent to which the general maritime law may be relied upon to expand the remedies available under the Jones Act. Relying on *Higginbotham*, the Court refused to allow the decedent's survivors to recover nonpecuniary wrongful death damages under the general maritime law because they could not recover such damages under the Jones Act. *Miles*, 498 U.S. at 30-33. In addition, the Court declined to allow the recovery of the decedent's lost future earnings under a general maritime law survival action, finding that such a recovery would be inconsistent with the remedies allowed by the Jones Act and maritime law. *Id.* at 35-36.

Finally, in *Zicherman*, the Court "made it crystal clear that where DOHSA governs, it governs exclusively."[15] The Court in *Zicherman*, rejecting the view that general maritime law governs recoverable damages for a death on the high seas, stressed that the Warsaw Convention cannot serve to "empower [the courts] to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition." *Zicherman*, 516 U.S. at 229. The Court stated that where DOHSA applies, neither state law nor general maritime law can provide a basis for the recovery of nonpecuniary damages and the application of the Warsaw Convention cannot change this result. *Id.* at 230.

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[14] 46 U.S.C. app. § 688 (RA 4).

[15] *Bickel v. Korean Air Lines*, 96 F.3d 151, 158 (6th Cir. 1996) (Batchelder, J., dissenting), *amending on reh'g*, 83 F.3d 127 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

If the Court now were to supplement DOHSA with nonpecuniary remedies, based on a general maritime law survival action, the Court would be "rewriting rules that Congress has affirmatively and specifically enacted," the Court would have to create an entirely "different class of beneficiaries" not mentioned in DOHSA (the estate of the decedent), and the Court would have to create a "different measure of damages" which Congress chose not to provide in DOHSA (nonpecuniary pre-death pain and suffering damages). *Higginbotham*, 436 U.S. at 625. This is precisely the result that the Court repeatedly has held cannot be achieved by a court, whether under cover of general maritime law or some other body of law. *Zicherman*, 516 U.S. at 229-30; *Miles*, 498 U.S. at 27-33; *Tallentire*, 477 U.S. at 209; *Higginbotham*, 436 U.S. at 624-25; *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 599-601 (1974) (Powell, J., dissenting). As the Court in *Calhoun* recently reaffirmed:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied [DOHSA and the Jones Act], there is, we have generally recognized, no cause for enlargement of the damages statutorily provided.

Calhoun, 516 U.S. at 215 (citing *Miles*, 498 U.S. at 30-36; *Tallentire*, 477 U.S. at 232; *Higginbotham*, 436 U.S. at 624-25). Thus, a court must give effect "to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' ". *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

B. Pre-Death Pain and Suffering Damages Are Not Consistent With the Language and Intent of DOHSA

Petitioners argue that the fact that Congress did not include a survival provision in DOHSA, allowing for the recovery of nonpecuniary pre-death pain and suffering damages, does not

prevent the Court from now creating such an action. In support of this position, Petitioners argue that (1) the language of DOHSA does not preclude the recognition of a survival action, (2) Congress did not intend to "eliminate" survival actions in enacting DOHSA and (3) this intent is confirmed by the enactment in 1980 of 46 U.S.C. app. § 763a. Petitioners' Brief at 15-39. Petitioners are wrong.

1. Pre-Death Pain and Suffering Damages Conflict With the Class of Beneficiaries and Damages Established by DOHSA

Petitioners argue that a general maritime law survival action, allowing for the recovery of nonpecuniary pre-death pain and suffering damages, does not conflict with DOHSA because such nonpecuniary damages will be recovered by the estate of the decedent in a separate action. Petitioners' Brief at 17, 33. The plain language of DOHSA forecloses the argument.

Section 761 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the *exclusive benefit* of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. app. § 761 (emphasis added) (RA 1).

Section 761 grants an exclusive right of action to the personal representative to sue for the death of the decedent for the "exclusive" benefit of the named beneficiaries. The Congressional aim of DOHSA was to create a uniform and exclusive remedy "[w]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. app. § 761 (RA 1); *see* 59 Cong. Rec. 4482-83 (Mar. 17, 1920). DOHSA, "so far as the high seas are concerned, makes the remedy exclusive." S. Rep. No. 66-216, at 3 (1919).

The general maritime law survival action proposed by Petitioners is independent from DOHSA and outside the scope of § 761. The action proposed by Petitioners would necessarily expand the class of beneficiaries recognized in DOHSA, which does not include a decedent's estate, and also would allow for the recovery of damages prohibited by DOHSA. As a result, DOHSA no longer would be the exclusive action for a death on the high seas "for the *exclusive* benefit" of the designated beneficiaries. As the Court of Appeals correctly concluded:

> Yet *Higginbotham* held that "it would be no more appropriate to prescribe a different measure of damages than to prescribe . . . a different class of beneficiaries." 436 U.S. at 625, 98 S.Ct. at 2015. It was, to the Court, unthinkable that a legislatively-mandated class of beneficiaries could be judicially altered. Suits under the Act are "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C.App. § 761 (emphasis added). In a death on the high seas case, there is no relevant difference between a court's giving a decedent's nondependent niece a right of action under general maritime law, which is clearly impermissible, and allowing the decedent's estate to sue for the decedent's injuries under the general maritime law.

117 F.3d at 1482 (JA 103) (emphasis in original).

Petitioners' proposed survival action also would allow the "estate" to recover nonpecuniary damages (not allowed by DOHSA) which would be distributed through the estate to the

designated beneficiaries according to applicable state intestacy statutes. Petitioners' Brief at 23. This recovery and distribution scheme would conflict with § 762 of DOHSA, which expressly provides that any recovery for a death on the high seas "shall be apportioned" by the Court. 46 U.S.C. app. § 762 (RA 1).

Moreover, Petitioners' proposed survival action also conflicts with the distribution schemes recognized in maritime law survival statutes. If the Court were to recognize a general maritime law survival action, as urged by Petitioners, the Court presumably would be guided by other federal statutes, which contain express provisions for a survival action. *See Miles*, 498 U.S. at 27; *Higginbotham*, 436 U.S. at 624. Pursuant to the survival provisions of the Jones Act, 46 U.S.C. app. § 688 (RA 4) and Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 59 (RA 7),[16] a decedent's personal representative may sue for damages suffered by the decedent, but only for the benefit of a fixed class of surviving relatives. The judicial adoption of such a survival provision in an action governed by DOHSA would be in direct conflict with the specific provisions of DOHSA. The Court of Appeals below explained that, while such an approach would leave DOHSA's designated beneficiary class intact,

> it would change the damages available to the Act's beneficiaries. No longer would damages be limited to "compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought," 46 U.S.C.app. § 762. The beneficiaries would also receive compensation for nonpecuniary losses sustained by others—their decedents. That result *Higginbotham* forecloses.

117 F.3d at 1482 (JA 104).

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[16] *See also* Longshoremen's Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 908(d), which provides a similar scheme for payment of benefits upon the death of a longshoreman.

In this regard, the most direct conflict that would be created by Petitioners' proposed survival action relates to recoverable damages. A general maritime law survival action for nonpecuniary pre-death pain and suffering damages conflicts with the "pecuniary losses" restriction of § 762 of DOHSA. Petitioners simply dismiss this inherent contradiction by insisting that DOHSA is a wrongful death statute which has no bearing on damages recoverable under a survival action. Both the Court of Appeals below and the Ninth Circuit in *Saavedra v. Korean Air Lines*, 93 F.3d 547 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996), properly rejected this argument. The Court below explained:

> [Petitioners] have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

117 F.3d at 1482-83 (JA 104-05).

The Ninth Circuit in *Saavedra* finding that it could not perceive of any distinction, which the *Zicherman* Court would have approved, that would prohibit the recovery of one type of nonpecuniary damages under DOHSA (*e.g.*, loss of society), but allow the recovery of another type of nonpecuniary damages in a DOHSA case (*e.g.*, pre-death pain and suffering), concluded:

> The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction.

93 F.3d at 554.

Pre-death pain and suffering damages, because they are not pecuniary damages, are not recoverable.

In light of *Zicherman* and other precedents of the Court, the district court below concluded that "DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles" and dismissed the claims for nonpecuniary pre-death pain and suffering damages. *In re KAL-DDC II*, 935 F. Supp. at 15 (JA 87-88). The Court of Appeals affirmed. *Dooley*, 117 F.3d at 1481-83 (JA 100-06). In both instances the courts below were correct and the judgment of the Court of Appeals should be affirmed.

2. Recognition of a Survival Action Where DOHSA Is Applicable Would Be Inconsistent With § 765 of DOHSA

That Congress intended, in DOHSA, to limit recovery in all cases of fatalities on the high seas, whether instantaneous or not, to the pecuniary loss sustained by the designated beneficiaries, is evidenced further by § 765 of DOHSA. 46 U.S.C. app. § 765 (RA 2).

Section 765 of DOHSA permits a personal representative to be substituted for an injured plaintiff, who dies during the pendency of a personal injury suit, but the suit may only then continue under DOHSA and only to recover the pecuniary loss damages permitted by DOHSA for the beneficiaries designated by DOHSA. *See In re Air Disaster Near Honolulu,*

Hawaii on Feb. 24, 1989, 792 F. Supp. 1541, 1546 n.8 (N.D. Cal. 1990) ("*Hawaii I*"). By enacting § 765, Congress changed the common law rule of non-survival of a personal injury action, but only to the extent specifically provided in DOHSA. As recognized by the Court in *Higginbotham*:

> [B]ecause Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, *survival*, and damages.

436 U.S. at 625 (emphasis added).[17]

While § 765 was not discussed during the DOHSA congressional debates in 1920, Robert Hughes, who claims to have drafted DOHSA, discussed this provision, as contained in an earlier version of DOHSA, during a House hearing in 1916. Mr. Hughes explained the impact of § 765 (then § 4) as follows:

> Here is another provision: The old limitation ran from the death of the decedent. Our draft is from the date of the wrongful act. Lord Campbell's act, you will remember, made it from the death of the decedent, but at that time there was no such thing as survival of action for personal injuries where the death did not occur within a

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[17] Section 765 is similar to some state wrongful death statutes. *See* 3 Stuart M. Speiser *et al.*, *Recovery for Wrongful Death and Injury* § 14:4, at 11 n.37 (3d ed. 1992) (discussing Virginia and West Virginia statutes); *see also El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483, 490-91 (4th Cir. 1986); *Bogen v. Green*, 239 A.2d 154 (D.C. 1968) (D.C. statute). Although the West Virginia and D.C. statutes were amended in 1989 and 1978, respectively, to allow recovery for pain and suffering, the fact remains that the legislature, *not* the courts, made the decision and the change in the law. *See id.*; *Estate of Helmick v. Martin*, 425 S.E.2d 235 (W. Va. 1992).

year, and consequently Lord Campbell's act had to make it from the date of the death. But now, under section 4, if a man is injured he can bring his suit, and if he dies pending the suit, he can revive it; so that difficulty under the law has been obviated, and consequently the statutes ought to run from the wrongful act and not from the death. The wrongful act is a matter in the knowledge of both parties. The death may be a matter only in the knowledge of one side, and expert testimony might show a man died in consequence of a collision 10 years after it happened. So that the difficulty Lord Campbell had to meet does not enter under the circumstances in view of section 4, which gives a right to sue for the damages before they result in death, and then to revive that, instead of having it abate, as it used to do at common law.

Right of Action for Death on the High Seas: Hearings Before the Subcomm. II, Procedure, Jurisdiction, Etc. of the Committee on the Judiciary, 64th Cong., at 15 (1916) (statement of Hon. Robert M. Hughes).

Petitioners reject the relevancy of § 765 and argue it is merely a "permissive means of ensuring the survival of the wrongful death remedy when death occurs after DOHSA's limitations had expired" and does not require the personal representative to abandon any survival action available under "applicable statutes or general maritime law." Petitioners' Brief at 32. The Congressional purpose for and significance of § 765 cannot so easily be dismissed.

Petitioners are incorrect in viewing § 765 as "permissive" and disregard that the word "may" is not used to designate a permissible course of action, but rather to revive a right of action that otherwise would have abated. *See, e.g., Wilson v. Transocean Airlines*, 121 F. Supp. 85, 94 (N.D. Cal. 1954) (interpreting "may" as used in § 761); *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909, 910 (S.D.N.Y. 1941) (interpreting "may" as used in § 764). As a result, if the personal representative did not "elect" to proceed under DOHSA, the previously commenced personal injury action would abate.

Moreover, Petitioners fail to identify any survival action that was available under "applicable statutes or general maritime law" in 1920, for a death on the high seas, which Congress could have possibly intended to preserve by adopting § 765 in DOHSA. Petitioners' Brief at 32. At the time DOHSA was enacted there was no general maritime law survival action and, therefore, a pending personal injury action, absent a statute, would have abated on the death of the decedent.[18] Thus, it is difficult to understand Petitioners' reference to a "survival action that was available under applicable statutes or general maritime law"—there were none in existence applicable to a death on the high seas. To accept Petitioners' argument would render § 765 nonsensical. A personal injury action cannot both continue under DOHSA as required by § 765 and at the same time continue independently outside the scope of DOHSA under a non-existent law. *See Oceanic Contractors, Inc.*, 458 U.S. at 575 ("interpretations of statutes which produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available").

Petitioners also find significant that § 765 refers to the damages and beneficiaries in § 761 and § 762 and does not allow for the recovery of the decedent's personal injuries. Petitioners' Brief at 33. It is significant, in that the effect of § 765 is affirmatively to extinguish the decedent's personal injury claim. Thus, § 765 reaffirms the exclusive nature of the DOHSA remedy and that the only "survival" of the personal injury action contemplated by Congress was to allow for the

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[18] While Petitioners do not refer to state survival statutes, at the time DOHSA was enacted, Congress considered that such statutes did not extend to the high seas and would be preempted by the exclusive nature of DOHSA. *See supra* note 10.

substitution of the party plaintiff after death and only to pursue the pecuniary damages permitted by DOHSA and for the benefit of the beneficiaries designated in DOHSA. *Hawaii I*, 792 F. Supp. at 1545-46. As the Court of Appeals below explained:

> That the Death on the High Seas Act contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted. *When Congress decides to go only so far it necessarily has decided to go no further.*

117 F.3d at 1482 (JA 102) (emphasis added).

To allow supplementation of DOHSA with nonpecuniary damages under general maritime law would effectively render § 761, § 762 and § 765 of DOHSA meaningless. *See Higginbotham*, 436 U.S. at 625 ("courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless"); *see also Tallentire*, 477 U.S. at 222 ("Normal principles of statutory construction require that [a court] give effect to the subtleties of language that Congress chose to employ . . . .").

The judgment of the Court of Appeals dismissing the claims for nonpecuniary pre-death pain and suffering damages should be affirmed.

3. Congress Left No Gap in DOHSA To Be Filled by General Maritime Law

Petitioners claim that neither the language of DOHSA nor its history suggests that Congress intended to "eliminate" survival actions. Petitioners' Brief at 24-29. Petitioners argue that, because DOHSA does not contain an express statement precluding a survival action for pre-death pain and suffering damages, the Court may now create one. Petitioners' Brief at 25. Relying on statutory interpretation principles, Petitioners

argue that, absent an explicit statement in a statute or an implicit presumption based on the structure and language of a statute, state law or common law remedies are not preempted by the enactment of a federal statute. Petitioners' Brief at 25.

Petitioners' argument again ignores the historical fact that when Congress enacted DOHSA in 1920, there was no general maritime law death action, whether for wrongful death or survival damages. Thus, in enacting DOHSA, Congress was creating a right that *did not* exist under the general maritime law. It was not necessary (and indeed would have been strange) for Congress to set forth in DOHSA a provision expressly stating that, in enacting DOHSA, it was preempting a cause of action that did not exist for a death on the high seas.

Moreover, it cannot accurately be said, that Congress was "silent" as to the availability of a survival action for pre-death pain and suffering. As fully discussed *supra* at 11-24, the structure and language of DOHSA evidences the congressional intent as to its exclusive nature and that supplementation of DOHSA is not possible. *Tallentire*, 477 U.S. at 227-32; *Higginbotham*, 436 U.S. at 623-25; *Moragne*, 398 U.S. at 397. Congress did not regard, let alone assume, that DOHSA could be supplemented under any law.

The more appropriate canon of statutory construction in relation to DOHSA in these cases is that:

> when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (quoting *Botany Mills v. United States*, 278 U.S. 282, 289 (1929)); *see Middlesex Cty.*

Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981); *see Dooley*, 117 F.3d at 1482 ("When Congress decides to go only so far it necessarily has decided to go no further.") (JA 102). Petitioners' argument turns this canon on its head.

Even if DOHSA is viewed as a strict wrongful death statute and as "silent" on the issue of survival, the presumption is that Congress, in enacting DOHSA, intended to *exclude* a survival action and all nonpecuniary damages.[19] Thus, "[i]n the absence of strong indicia of a contrary congressional intent, [courts] are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex Cty. Sewerage Auth.* 453 U.S. at 15.

There is no indication that Congress intended to leave a gap in DOHSA which could be filled by some unknown source of law. The absence of a general survival action in DOHSA cannot be considered a mere congressional oversight which allows for judicial supplementation of the DOHSA remedy.[20] The drafters of DOHSA clearly understood the distinction between wrongful death and survival remedies and expressly

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19 Indeed, the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme such as DOHSA. *See Calhoun*, 516 U.S. at 215; *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981). DOHSA sets forth all the essential elements for a cause of action.

20 Any argument that DOHSA was not carefully drafted is belied by the legislative history of DOHSA. DOHSA was first considered as early as 1909 and discussed in every session until its passage. *See* F. Cunningham, *Shall We Continue To Be Drowned at Sea Without Remedy?*, 22 Case & Com. 129 (1915); R. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115 (1921); H. Putnam, *The Remedy for Death at Sea*, 22 Case & Com. 125 (1915); G. Whitelock, *Damages for Death By Negligence at Seas—The Titanic*, 49 Am. L. Rev. 75 (1911); G. Whitelock, *A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts*, 22 Harv. L. Rev. 401 (1909) (outlining history of DOHSA); *see also* 59 Cong. Rec. 4484 (Mar. 17, 1920); 52 Cong. Rec. 1065-76 (Jan. 6, 1915); H.R. Rep. No. 63-160 (1913).

limited recoverable damages in DOHSA to the pecuniary losses sustained by the designated beneficiaries. *See* R. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 119-20 (1921). This is clear from the reports of the Senate and House Judiciary Committees leading to the enactment of DOHSA:

> . . . *State statutes . . . are far from uniform. In some States the recovery is limited to the conscious suffering before death—a matter difficult of proof in case of drowning at sea.* Other States only give the remedy against those who are common carriers, which would not apply to vessels chartered or engaged for a single owner. In a few States the remedy for damages must follow or be concurrent with a criminal prosecution, so that the offender must have been first indicted.
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> * * *
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> Such State statutes, diverse in their terms and conflicting in remedies, are but a poor makeshift for the uniform, simple legislation which Congress alone can enact.
>
> The present bill is designed to remedy this situation by giving a right of action for death, to be enforced in the courts of admiralty, both in rem and in personam. *The right is made exclusive for deaths on the high seas*, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.

S. Rep. No. 66-216, at 3 (1919) (statement of Hon. H. Putnam) (emphases added and citation omitted).

Shortly after the enactment of DOHSA, the same Congress enacted the Jones Act, which specifically provides for a survival remedy, in addition to a wrongful death action for seamen, through the incorporation of the provisions of the

FELA.[21] *Miles*, 498 U.S. at 35; *Hawaii I*, 792 F. Supp. at 1546 n.8. No such survival provision was included in DOHSA. *Id.* Had the same Congress intended to provide for a general survival action and appropriate remedies under DOHSA, as it did in the Jones Act, clearly it would have done so. As the Court of Appeals below correctly noted:

> A fair assumption is that the members of Congress who passed the Death on the High Seas Act understood the difference between wrongful death and survival actions. Their inclusion of a survival remedy in the Jones Act but not in the Death on the High Seas Act scarcely seems inadvertent.

117 F.3d at 1481-82 (JA 102).

Petitioners dismiss the significance of the Jones Act survival provision, stating that the Jones Act was hastily enacted and "just one section of a comprehensive legislation dealing with maritime matters." Petitioners' Brief at 33. The implication, therefore, is that Congress did not carefully consider the effect of the incorporation of FELA into the Jones Act. Petitioners' Brief at 34. If Petitioners are correct, then the implication is that, because the Jones Act was enacted after DOHSA, which was carefully considered, the allowance of a survival provision in the Jones Act was unintended. Under Petitioners' argument, however, had Congress fully considered the issue, Congress would have patterned the Jones Act after DOHSA and would not have included a survival remedy in the Jones Act as it did.

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[21] 45 U.S.C. app. §§ 51 *et seq.* (RA 6-7). FELA was adopted on April 22, 1908. As originally drafted, FELA did "not provide for any survival of the right of action created in behalf of an injured employee," and FELA being paramount and exclusive, it "therefore extinguished" any such right given by state survival statutes. *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 67-68 (1913); *see St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 656 (1915). As a result, Congress amended FELA on April 5, 1910 to provide, in addition to a wrongful death action, a survival action. *Craft*, 237 U.S. at 660-61; S. Rep. No. 61-432, at 12-15 (1910); H.R. Rep. No. 61-513, at 3-6 (1910).

It must be accepted "that Congress is aware of existing law when it passes legislation." *Miles*, 498 U.S. at 32; *Tallentire*, 477 U.S. at 228; *Dooley*, 117 F.3d at 1481-82 (JA 102). Therefore, if Congress had intended to allow for the survival of a decedent's personal injury claim in a high seas death, it certainly would have done so in DOHSA, as it did in 1910 with FELA. The simple fact is that Congress did not do so and, as a result, the courts cannot now presume to do what Congress chose not to do. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21 (1979) (in addressing whether to recognize a private remedy, the Court stated: "Obviously . . . when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.").

4. The Enactment of § 763a Does Not Acknowledge Congress' Approval of Survival Actions Coexisting With DOHSA Actions

Petitioners argue that § 763a "acknowledges Congress' approval of survival actions coexisting with DOHSA death actions." Petitioners' Brief at 29. This argument is based on an erroneous interpretation of the clear language, purpose and intent of § 763a. 46 U.S.C. app. § 763a (RA 2).

Petitioners are simply wrong when they state that "§ 763a was enacted as part of DOHSA." Petitioners' Brief at 31. The Codification Note following § 763a expressly states that this "[s]ection was not enacted as part of act Mar. 30, 1920, known as the Death on the High Seas Act, which comprises this chapter." 46 U.S.C. app. § 763a note (1994) (Codification Note) (RA 2). Accordingly, while § 763a is a part of Title 46, it is not a part of DOHSA.

Petitioners are also incorrect in suggesting that Congress enacted § 763a in response to court decisions "recogniz[ing] a general maritime law survival cause of action akin to the *Moragne* general maritime death action." Petitioners' Brief

at 11. The legislative history leading to the enactment of § 763a demonstrates that the purpose of § 763a was simply "to establish a uniform national statute of limitations for maritime torts." H.R. Rep. No. 96-737, at 1 (1980); *see* 126 Cong. Rec. 2591 (1980) (statement of Rep. Murphy) ("The bill now under consideration [§ 763a] would establish a uniform statute of limitation of actions seeking compensation for injury or death resulting from a maritime tort."); *Usher v. M/V Ocean Wave*, 27 F.3d 370, 371 (9th Cir. 1994) ("In 1980, Congress adopted § 763a, providing a uniform three-year statute of limitations for maritime personal injury and wrongful death claims.").[22]

Prior to the enactment of § 763a in 1980, any of at least three different statutes of limitation could apply to plaintiffs' suits arising from personal injuries or death sustained on navigable waters. The statute of limitations for a cause of action pursuant to DOHSA was two years and for a cause of action pursuant to the Jones Act was three years. In addition, a cause of action under the general maritime concept of "unseaworthiness" was not governed by any specific statute of limitations, but was governed by the doctrine of laches, permitting courts to reach widely divergent interpretations and allowing litigants to choose those courts with the most favorable interpretation of timeliness. *See* H.R. Rep. No. 96-737, at 1-2 (1980); 126 Cong. Rec. 2592 (1980) (statement of Rep. Dornan); 126 Cong. Rec. 26,884 (1980) (statement of Sen. Cannon).

In enacting § 763a, Congress intended to establish a uniform period of limitations for all suits arising from maritime torts and to eliminate the uncertainty caused by reliance on the doctrine of laches. *See* H.R. Rep. No. 96-737, at 1-2

[22] The bill (H.R. 3748) was entitled the "Uniform Statute of Limitations for Marine Torts." *See* H.R. Rep. No. 96-737, at 1 (1980); 126 Cong. Rec. 2591 (1980); *Bennett v. United States Lines, Inc.*, 64 F.3d 62, 63 (2d Cir. 1996).

(1980) ("These divergent interpretations of timeliness for bringing an unseaworthiness claim have resulted in many litigants choosing the most favorable forum in which to bring suit."); 126 Cong. Rec. 2592 (1980) (statement of Rep. Dornan) (§ 763a "would eliminate this inconsistency by establishing a 3-year statute of limitations that would apply to both claims brought under the 'unseaworthiness' doctrine and to claims brought under the Death on the High Seas Act."). The legislative history of § 763a contains no reference that supports Petitioners' erroneous assumption that in enacting § 763a Congress somehow approved of survival actions coexisting with DOHSA death actions. Petitioners' Brief at 11, 30-31.

Significantly, Petitioners ignore that Congress did not merely amend § 763, but repealed § 763 and enacted § 763a, not as a replacement of § 763, but as a *new* section to all shipping laws (Title 46). *See* 46 U.S.C. app. § 763a (Codification Note) (RA 1-2).

Based on the actual purpose of § 763a, as historically detailed above, Petitioners' entire argument that "[i]t is difficult to identify a purpose for the 'or both' language other than a recognition that both survival and death actions may be maintained simultaneously," is simply wrong. Petitioners' Brief at 30-31. Because Congress intended § 763a to eliminate the inconsistency in maritime law, by establishing a three-year statute of limitations for *all* maritime tort claims, § 763a governs any suit for personal injuries **or** wrongful death arising from a maritime tort, and any suit for personal injuries **and** wrongful death arising from a maritime tort. *See Bennett*, 64 F.3d at 63; *Ford v. Atkinson Dredging Co.*, 474 S.E.2d 652 (Ga. Ct. App. 1996).

Section 763a cannot correctly be construed to recognize concurrent actions for personal injuries and wrongful death pursuant to DOHSA. Petitioners' argument to the contrary lacks any merit.

II

THERE IS NO GENERAL MARITIME LAW SURVIVAL ACTION THAT EXTENDS TO THE HIGH SEAS

In light of the exclusive nature of DOHSA, there can only be one answer to the question of whether the Court should create, as urged by Petitioners, a general maritime law survival cause of action for pre-death pain and suffering for a death occurring on the high seas—No.

The decisions of the Court make clear that general maritime law, as federal common law, is merely a necessary expedient "resorted to '[i]n absence of an applicable Act of Congress' " when federal courts are forced to resolve issues which cannot be answered by or with reference to federal statutes alone. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)); *see Miles*, 498 U.S. at 27-31, 38; *Higginbotham*, 436 U.S. at 623-25. In this case, there is no need to resort to general maritime law, let alone create an entirely new cause of action, as there is an applicable federal statute, DOHSA, that has already resolved the issue.

DOHSA does not allow recovery for pre-death pain and suffering and the Court has never recognized the existence of a general maritime law survival action applicable to a death on the high seas. *See Calhoun*, 516 U.S. at 210 n.7; *Miles*, 498 U.S. at 33-35; *Tallentire*, 477 U.S. at 215 n.1; *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 370-71 (1932); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 157 (1964).

Nevertheless, Petitioners argue that Moragne somehow can support the recognition of a general maritime law survival action, as a supplement to the DOHSA remedy. Petitioners' Brief at 19-22. This argument flies in the face of DOHSA,

ignores the rationale of *Moragne* and would extend *Moragne* to create a general maritime law *survival action* for a death on the *high seas*.

A. *Moragne* Cannot Serve as the Basis for Supplementing the Exclusive DOHSA Recovery

Moragne involved an action for the death of a longshoreman killed in Florida territorial waters. 398 U.S. at 376. An action was brought under the Florida state wrongful death and survival statutes alleging both negligence and unseaworthiness. The district court dismissed the wrongful death unseaworthiness claim on the basis of *The Tungus v. Skovgaard*, 358 U.S. 588 (1959),[23] which held that when state statutes are applied to fatalities in the territorial waters, the state statute provides the standard of liability as well as the remedial scheme. The Court of Appeals affirmed the dismissal of the unseaworthiness claim, following the decision of the Florida Supreme Court holding that the Florida wrongful death statute did not encompass unseaworthiness as a basis for liability.

The Court in *Moragne* reversed the decision. The Court first noted that the source of the problem did not lie with *The Tungus*, but with *The Harrisburg*. 398 U.S. at 378. After reexamining the soundness and historical basis for the rule announced in *The Harrisburg*, the Court overruled *The Harrisburg* and recognized a general maritime law *wrongful death* cause of action based on unseaworthiness for a death occur-

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[23] In *The Tungus*, the Court addressed the consequences that flow from the rule in *The Harrisburg* that in the absence of a statute there is no action for wrongful death. In such a situation, the Court found that where the death on state territorial waters is left remediless by general maritime law and by federal statute, a remedy may be provided under any applicable state death statute. The Court, however, divided on the further holding that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." *The Tungus*, 398 U.S. at 592.

ring in state *territorial* waters. *Id.* at 409. Central to *Moragne* was the unavailability of the doctrine of unseaworthiness as the basis for liability under the state wrongful death statute. Also important was the finding by the Court that there was no affirmative Congressional intent or public policy[24] that precluded recognition of a general maritime law action for wrongful death occurring in the territorial waters. The Court recognized the "wholesale abandonment" of the rule against wrongful death actions:

> In the United States, every State today has enacted a wrongful-death statute. The Congress has created actions for wrongful deaths of railroad employees, Federal Employers' Liability Act, 45 USC §§ 51-59; of merchant seamen, Jones Act, 46 USC § 688; and of persons on the high seas, Death on the High Seas Act, 46 USC §§ 761, 762.

398 U.S. at 390 (citation omitted).

The Court specially noted that DOHSA "was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." *Id.* at 402. Thus, while *Moragne* recognized a general maritime wrongful death action for territorial waters, the Court was cognizant of the role and preeminence of federal legislation, such as DOHSA.

In the period between *Moragne*'s recognition of a general maritime law wrongful death action for a death in the territorial waters and *Higginbotham*, the lower federal courts had extended *Moragne* to the high seas to allow recovery of nonpecuniary wrongful death damages and to create a survival action not recognized by DOHSA. These courts viewed that the common law *Moragne* action had completely supplanted the statutory DOHSA action. *See Higginbotham*, 436 U.S. at

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[24] *Moragne*, 398 U.S. at 390 (citing DOHSA, the Jones Act, FELA and the Federal Tort Claims Act, 28 U.S.C. § 2674).

623 n.16; *Law v. Sea Drilling Corp.*, 523 F.2d 793, 798 (5th Cir. 1975).

Against this historical backdrop, the Supreme Court in *Higginbotham* addressed the question: "whether, in addition to the damages authorized by federal statute [DOHSA], a decedent's survivors may also recover damages under general maritime law." 436 U.S. at 618. The Court's answer was an unequivocal "No". The Court explained:

> Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses.
>
> * * *
>
> In *Moragne*, the Court recognized a wrongful-death remedy that supplements federal statutory remedies. But that holding depended on our conclusion that Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies. Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements. . . . In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

436 U.S. at 623, 625 (citations omitted); *see Miles*, 498 U.S. at 32 (courts are not to "sanction more expansive remedies in a judicially created cause of action . . . than Congress has allowed").

Nevertheless, Petitioners now argue that DOHSA leaves a "gap" that may be filled by a general maritime law survival action based on *Moragne* and claim to find support for such an extension in *Higginbotham*. Petitioners' Brief at 20-22, 34-37.

Petitioners rely upon the Court's statement in *Higginbotham* that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Petitioners' Brief at 35 (citing 436 U.S. at 625). Petitioners misunderstand the statement of the Court. The statement is not an invitation to supplement DOHSA with nonpecuniary damages under general maritime law. The Court simply was stating that it was appropriate for the Court in *Moragne* to recognize a wrongful death action under general maritime law and for the Court, in *Gaudet*, to allow recovery of loss of society damages, because both *Moragne* and *Gaudet* involved deaths occurring in the territorial waters, where Congress has not legislated. *Higginbotham*, 436 U.S. at 625. This was not the case in *Higginbotham*, however, as the deaths there occurred on the high seas, where Congress has legislated in DOHSA.[25]

Similarly, Petitioners' argument that Gaudet implicitly approves recovery of survival damages under DOHSA is wrong. Petitioners' Brief at 38-39. The issue in *Gaudet*, a non-DOHSA action involving a longshoreman, was whether decedent's recovery prior to his death for his personal injuries precluded his widow from recovering wrongful death damages after his death. The Court held that she was not. Petitioners' conclusion that this result supports a general maritime law survival action is baseless. While *Gaudet* stated in footnote 10 that this result was consistent with DOHSA, the Court did not refer to any cases or provide an analysis. 414 U.S. at 584 n.10; *see Higginbotham*, 436 U.S. at 622 n.15 (noting that DOHSA offers no guidance on this issue). Moreover, footnote 10, even if accurate, does not support Petitioners' argument that DOHSA may be supplemented with a survival action. *See* 414 U.S. at 600-01 (Powell, J., dissenting). The Court of Appeals in *Bodden v. American Offshore, Inc.*, 681 F.2d 319 (5th Cir. 1982), addressed the "narrow question" that confronted the *Gaudet* Court, but in the context of DOHSA. While reaching a conclusion similar to *Gaudet*, the *Bodden* court recognized that "DOHSA does furnish an exclusive remedy for *injuries* occurring on the high seas." *Bodden*, 618 F.2d at 327 (emphasis added). Thus, *Bodden* confirms that DOHSA is "exclusive" and cannot be supplemented.

[25] Similarly, Petitioners misunderstand the Court's statement in *Higginbotham* that DOHSA does not address every issue of wrongful death. Petitioners' Brief at 35. The Court was simply noting that DOHSA offered no guidance to whether a death action can be maintained if the decedent recovers personal injury damages prior to death. *See Higginbotham*, 436 U.S. at 622 n.15.

Petitioners' argument in support of a general maritime law survival action for nonpecuniary pre-death pain and suffering damages disregards the exclusivity of DOHSA and the following essential factors, which led the Court in *Moragne* to recognize a general maritime law wrongful death action, which are not present in these cases: (1) the unavailability of unseaworthiness based liability; (2) the universal abandonment of the common-law rule and (3) the absence of federal legislation. *Moragne*, 398 U.S. at 388-403.

Unseaworthiness. The disparity between the unseaworthiness doctrine's strict liability standard and negligence-based state wrongful death statutes "figured prominently" in the *Moragne* decision. *Calhoun*, 516 U.S. at 208; *Moragne*, 398 U.S. at 395-97. Unlike the situation confronted by the Court in *Moragne*, DOHSA recognizes unseaworthiness as a basis for liability. *See Miles*, 498 U.S. at 26.

Wholesale abandonment of the common law rule. Unlike the "wholesale abandonment" of the common law rule against wrongful death actions as evidenced by state and federal statutes, the same cannot be said with respect to survival actions for the recovery of pre-death pain and suffering damages. At the State level, at least eight States and the Virgin Islands today specifically prohibit the recovery of pre-death

pain and suffering damages.[26] At the federal level, "DOHSA does not include a survival provision authorizing recovery for pain and suffering before death." *Tallentire*, 477 U.S. at 215 n.1; *see Miles*, 498 U.S. at 35. Thus, it cannot be said that there is a unanimous "policy" permitting pre-death pain and suffering damages.

Absence of federal legislation. Finally, while in *Moragne* there was the absence of any applicable federal legislation, Congress has legislated for all deaths occurring on the high seas. Supplementation of DOHSA with nonpecuniary damages under general maritime law is not simply "gap" filling,

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[26] *See, e.g., Arizona*: Ariz. Rev. Stat. § 14-3110 (1997) (survival statute expressly provides that "damages for pain and suffering of such injured person shall not be allowed."); *California*: Cal. Civ. Proc. Code § 377.34 (West 1998) (recoverable damages in survival action "do not include damages for pain, suffering, or disfigurement"); *Colorado*—Colo. Rev. Stat. § 13-20-101(1) (1997) (survival statute expressly provides that recoverable damages "shall not include damages for pain, suffering, or disfigurement."); *Idaho*: *Vulk v. Haley*, 736 P.2d 1309, 1313 (Idaho 1987) ("[A]n action for pain and suffering does not survive the death of the injured."); *Virginia*: Va. Code Ann. § 8.01-25 (Michie 1997) (if death caused by injury, pleading must be amended and brought under wrongful death statute); *Seymour v. Richardson*, 75 S.E.2d 77, 81 (Va. 1953) (no recovery for pain and suffering of decedent in wrongful death action); *Virgin Islands*: V.I. Code Ann. tit. 15, § 601 and tit. 5, § 76(d) (1997) (survival statute is subject to wrongful death statute which provides that "[w]hen a personal injury to the decedent results in his death no action for the personal injury shall survive, and any such action pending at the time of death shall abate."); *Wyoming*: Wyo. Stat. § 1-4-101 (1997) (if injured person dies, then damages limited to those recoverable for wrongful death); *Parsons v. Roussalis*, 488 P.2d 1050, 1052 (Wyo. 1971) (where decedent's death caused by injuries, pain and suffering damages are not recoverable). In addition, *Indiana* and *Minnesota* do not allow survival of actions for pre-death pain and suffering damages where the decedent has died from the actionable injuries. *See Indiana*: *American Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1457-58 (7th Cir. 1996); *Minnesota*: Minn. Stat. Ann. § 573.02 (West 1997).

as argued by Petitioners. It amounts to a circumvention of the pecuniary loss proscriptions of DOHSA.

The Court in *Miles*, *Calhoun* and *Zicherman* reaffirmed *Higginbotham*'s interpretation of *Moragne*. The Court in *Miles* explained that because "*Moragne* involved gap filling in an area left open by statute; supplementation was entirely appropriate." *Miles*, 498 U.S. at 31. However, in an "area covered by the statute," supplementation is improper. *Id.* (quoting *Higginbotham*, 436 U.S. at 625). Thus, it is *not* "only a small leap from the decision in *Moragne* to an acceptance of the survival of personal injury actions as an integral part of the general maritime law." *Spiller v. Thomas M. Lowe & Assocs., Inc.*, 466 F.2d 903, 910 n.9 (8th Cir. 1972) (quoting *Marsh v. Buckeye S.S.*, 330 F. Supp. 972, 975 (N.D. Ohio 1971)). Rather, the recognition of such an action and then extending it to the high seas is a giant leap of faith that requires a disregard of what Congress enacted in DOHSA.

Petitioners misread *Miles* as supporting the recognition of a general maritime law survival action. Petitioners' Brief at 36-37. *Miles* was a non-DOHSA territorial waters death action, involving claims for the death of a seaman under the Jones Act which *specifically* creates a survival action. *Miles*, 498 U.S. at 33. The Court declined to allow the recover of nonpecuniary wrongful death damages under the general maritime law that were not recoverable under the Jones Act. *Id.* at 30-33. Thus, while the general maritime law permits recovery other than those imposed by the Jones Act, such recovery may not exceed the recovery that would be available under the Jones Act.

Moreover, *Miles* declined to address whether there is a general maritime law survival action because the resolution was unnecessary to the narrow question of whether lost future earnings are recoverable in a survival action. *Id.* at 34. Petitioners ignore the central holding of *Miles* that general maritime law cannot supplement the damage scheme provided by

Congress in the Jones Act (and in DOHSA). As the Court said:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in sur-vival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

Id. at 36.

Next, the Court in *Calhoun* addressed the question whether the general maritime law death action recognized in *Moragne* can preempt state wrongful death and survival statutes, where the death occurs in territorial waters. The Court found that *Moragne* did not displace state death remedies in such cases. Critical to the analysis in *Calhoun*, as in *Moragne*, was the fact that *there was no applicable federal statute*. *Calhoun*, 516 U.S. at 215. The Court specifically contrasted the *Calhoun* situation with the situations where Congress has spoken, such as in DOHSA and in the Jones Act. The Court stressed that in those situations, "there is, we have generally recognized, no cause for enlargement of the damages statutorily provided." *Id.*

Finally, in *Zicherman*, the Court reaffirmed that where DOHSA governs, it governs exclusively, and it cannot be supplemented by general maritime law or otherwise. 516 U.S. at 230-31. On the basis of *Zicherman*, the Ninth Circuit in *Saavedra* correctly held:

> We are therefore compelled to hold that because DOHSA does not allow recovery for nonpecuniary damages, we cannot "supplement" Congress' remedy, allowing a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed here.

Saavedra, 93 F.3d at 554.

To the extent that some lower courts have allowed supplementation of DOHSA with nonpecuniary damages for pre-death pain and suffering under general maritime law (or a state survival statute),[27] these decisions are incorrect and based upon the same faulty reasoning as advanced by Petitioners herein. These decisions, many of them decided before *Miles* and *Zicherman*, fail to give proper deference to DOHSA and ignore that a court

> must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Miles, 498 U.S. at 27.

Congress intended DOHSA to preempt anything but pecuniary damages where DOHSA applies. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1349 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989). If the Court were now to create a general maritime survival law action for a death on the high seas, DOHSA's preemptive force would be nullified. *Id.* Any time a court creates a federal common law rule, "it risks violating *both* of the fundamental limits on the judicial branch: feder-

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[27] *See, e.g., Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1371 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3509 (U.S. Jan. 22, 1998) (No. 97-1209); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *see also Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) (applying state survival statute in DOHSA action). *See also* Petitioners' Brief at 24.

alism and separation of powers." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1250 (6th Cir. 1996). The Court in *United States v. Locke*, 471 U.S. 84 (1985), stated:

> [T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 (1981). On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962).

471 U.S. at 95; *see Zicherman*, 516 U.S. at 231; THE FEDERALIST No. 78, at 468-69 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It can be of no weight to say, that the courts on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.").

The holding of the Court of Appeals below, that nonpecuniary pre-death pain and suffering damages may not be awarded to supplement the damages available under DOHSA is in accord with the long standing principles established by the Court and should be affirmed.

B. Petitioners' Policy Arguments Cannot Override a Congressional Enactment

Petitioners argue that there are "strong policy" reasons for the creation of a general maritime law survival action and that, if the Court does not create a survival cause of action, a decedent with "no dependents" would go uncompensated. Petitioners' Brief at 40-41.

The Court addressed and rejected a similar policy-based argument in *Zicherman*. In rejecting the argument that DOHSA cannot supply the substantive damage law for a death on the high seas where the Warsaw Convention also applies because it would not sufficiently deter wilful misconduct, the Court stated: "it is the function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence." 516 U.S. at 231; *see Dooley*, 117 F.3d at 1481 (JA 101).

The fact that at least eight States and the Virgin Islands do not allow for the recovery of pre-death pain and suffering damages (*see supra* note 26), evidences that there is no universal policy to allow the recovery of such damages. Certainly, whether to allow pre-death pain and suffering damages is a policy decision for "Congress, and not of this Court." *Zicherman*, 516 U.S. at 231; *see* C. Nagy, *The General Maritime Law Survival Action: What Are the Recoverable Elements of Damages?*, 9 U. Haw. L. Rev. 5, 76-78 (1987).

Petitioners' argument that absent a survival action a person with "no dependents" may not be compensated is baseless. The Court in *Robertson v. Wegmann*, 436 U.S. 584 (1978), in addressing the fairness of Louisiana's survivorship law pursuant to which the action survives only in favor of a spouse, children, parents or siblings, stated: "But surely few persons are not survived by one of these close relatives. . . ." *Id.* at 591-92. The Court also noted that such restrictions are not unreasonable and akin to those found in FELA and LHWCA. *Id.* at 592 n.8. Nevertheless, Petitioners urge the Court to cre-

ate an action that is contrary to a federal statute in order to benefit a hypothetical class of plaintiffs. *See Miles*, 498 U.S. at 36.

Petitioners' related argument that failure to create a survival action would motivate a wrongdoer to "prolong the personal injury litigation for years in the hopes of the injured person's demise" is absurd. Petitioners' Brief at 41. The "wrongdoer" does not escape legal liability. The injured person's spouse, parents, children and dependent relatives have a cause of action against the wrongdoer for their damages in the event of death of the injured person.

Finally, Petitioners, invoking the maritime doctrine of special solicitude, argue that the remedies to non-seafarers should be uniform with those available to seamen under the Jones Act. Petitioners' Brief at 41-42. Neither the concept of special solicitude, even if it extends to non-seafarers, nor a desire for uniformity, can be used to create an action contrary to DOHSA. *See Zicherman*, 516 U.S. at 229-31; *Higginbotham*, 436 U.S. at 624; *see also* U. Colella, *The Proper Role of Special Solicitude in the General Maritime Law*, 70 Tul. L. Rev. 227, 308 (1995) ("separation of powers concerns prevent courts from relying on expansive notions of special solicitude to subvert congressional policy judgments").

Because DOHSA is exclusive and does not allow for the recovery of nonpecuniary pre-death pain and suffering damages, the recognition of a general maritime law survival action for the high seas would undermine DOHSA. Just as the reasoning in *Moragne* compelled the conclusion that a general maritime law action is cognizable for deaths occurring in state territorial waters, *Zicherman*, *Miles*, and *Higginbotham* together establish that the general maritime law cannot undermine the Congressional policy in DOHSA.

CONCLUSION

The judgment of the Court of Appeals, that nonpecuniary damages for pre-death pain and suffering are not recoverable in a death action governed by DOHSA, should be affirmed in all respects.

Respectfully submitted,

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UNITED STATES CODE
TITLE 46 APPENDIX. SHIPPING
CHAPTER 21—DEATH ON THE HIGH SEAS BY WRONGFUL ACT

46 U.S.C. app. § 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

(Mar. 30, 1920, ch. 111, § 1, 41 Stat. 537.)

46 U.S.C. app. § 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

(Mar. 30, 1920, ch. 111, § 2, 41 Stat. 537.)

46 U.S.C. § 763. Limitations [Repealed]*

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after expiration of such period of two years the right of action hereby given shall not be deemed to have

lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

(Mar. 30, 1920, ch. 111, § 3, 41 Stat. 537.)

* (§ 763. Repealed. Pub. L. 96-382, § 2, Oct. 6, 1980, 94 Stat. 1525.)

46 U.S.C. app. § 763a. Limitations*

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

(Pub. L. 96-382, § 1, Oct. 6, 1980, 94 Stat. 1525.)

* Codification: Section was not enacted as part of act Mar. 30, 1920, known as the Death on the High Seas Act, which comprises this chapter.

46 U.S.C. app. § 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

(Mar. 30, 1920, ch. 111, § 4, 41 Stat. 537.)

46 U.S.C. app. § 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this Appendix during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the

recovery of the compensation provided in section 762 of this Appendix.

(Mar. 30, 1920, ch. 111, § 5, 41 Stat. 537.)

46 U.S.C. app. § 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

(Mar. 30, 1920, ch. 111, § 6, 41 Stat. 537.)

46 U.S.C. app. § 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

(Mar. 30, 1920, ch. 111, § 7, 41 Stat. 538.)

TITLE 46 APPENDIX. SHIPPING
CHAPTER 18—MERCHANT SEAMEN PROTECTION AND RELIEF (JONES ACT)

46 U.S.C. app. § 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies,

equipment or personnel, but not including transporting those resources by [a] vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(Mar. 4, 1915, ch. 153, § 20, 38 Stat. 1185; June 5, 1920, ch. 250, § 33, 41 Stat. 1007; Dec. 29, 1982, Pub. L. 97-389, title V, § 503(a), 96 Stat. 1955.)

TITLE 45. RAILROADS
CHAPTER 2—LIABILITY FOR INJURIES TO EMPLOYEES (FEDERAL EMPLOYERS' LIABILITY ACT)

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, *but in such cases there shall be only one recovery for the same injury.*

(Apr. 22, 1908, ch. 149, § 9, as added Apr. 5, 1910, ch. 143, § 2, 36 Stat. 291.)

No. 97-704

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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SUMMARY OF ARGUMENT

In their briefs, Respondent Korean Air Lines and *Amicus Curiae,* The United States, miscast the issue presented to this Court in an attempt to align the circumstances here with those at issue in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), where the Court held that a general maritime law *death action* could not be superimposed on a Death on the High Seas Act ("DOHSA", 46 U.S.C. App. § 761, *et seq.*) death action. The issue before the Court is *not* whether common law remedies for the same kind of injury (here, death) can supplement statutory remedies specifically granted by Congress, as in DOHSA. All parties agree that such a common law action for the same injury is forbidden because it would change the statutory remedy created by Congress in a manner inconsistent with what Congress provided.

The question is also *not* whether Congress created a survivorship action under DOHSA; Petitioners concede that it did not. If a common law survivorship action exists, as the Court inferred it does in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), it comes from the powers traditionally exercised by maritime courts to create rights and remedies according to the principles of common law, adjusted for the circumstances of the sea.

The real question presented is whether, by enacting DOHSA, Congress, without saying so, intended to preclude the maritime courts from exercising their traditional common law powers to create a remedy for the injuries sustained by a decedent prior to death. In other

words, the question is *not* whether pre-death damages may be recovered *under DOHSA* – everyone agrees they cannot – but whether DOHSA preempts maritime courts from developing a remedy, in favor of the estate of the decedent, for pre-death damages not addressed in DOHSA. The arguments in the opposing briefs are, for the most part, directed to the issue of whether it would be consistent with DOHSA's express provisions to allow recovery of damages of the kind sought, which is not what Petitioners seek. Therefore, much of their argument is irrelevant.

In order to demonstrate why Petitioners should prevail, it may be helpful to recast the issues into their proper configuration and to set forth a few points on which Petitioners believe there is no serious disagreement.

First, the *wrongful death* actions arising from this air disaster are governed by DOHSA. *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996).

Second, DOHSA operates only on the high seas, and deals only with wrongful conduct resulting in death. Thus, none of its limitations would apply if, by some miracle in this case, one of the passengers had survived, and brought a personal injury action against Korean Air Lines ("KAL"). Nor would DOHSA apply in a more typical maritime disaster (like a modern day *Titanic*) where some of the passengers survive a sinking vessel and the watery aftermath.

Third, DOHSA does not prevent the courts from developing common law wrongful death remedies for accidents occurring in territorial waters based on federal

maritime law principles (*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)) or on state law (*Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996)).

Fourth, DOHSA does not prevent the Court from developing new common law principles or applying existing laws to provide survivorship actions for maritime accidents not occurring on the high seas. Although this Court has never spoken directly on that issue, it has noted, without disapproval, in *Miles v. Apex Marine Corp., supra*, 498 U.S. 19, that many lower courts had concluded that the widespread adoption of federal and state survival statutes had dictated a change in the traditional general maritime law prohibiting survival actions. *Id.*, 498 U.S. at 34. Point I of Petitioners' opening brief made clear that, except possibly as to accidents on the high seas (the issue presented here), no federal law precludes the Courts from creating survivorship actions, except for claimants such as seamen and longshore and harbor workers who, because of their occupations, are covered by other specific statutes besides DOHSA.[1]

Fifth, survival action remedies and wrongful death remedies are different in nature and address mutually exclusive elements of damage. The survival action seeks recovery for losses suffered by the individual prior to his death; the death action is for losses suffered by the decedent's family after his death.

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[1] The Jones Act, 46 U.S.C. § 688 (1988 ed.) for seamen and the Longshore Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* for longshoremen and harbor workers.

Sixth, although both Respondent and the United States avoid the issue as much as possible, the principle that they advocate would not be limited to the facts of this case in which the damages claimed are for approximately 12 minutes of pain and suffering. If adopted, the rule that they advance would apply whenever a person is injured by wrongful conduct on the high seas and eventually dies from the accident, no matter how long thereafter and no matter what the nature of the damages sustained. Under Respondent's and the Government's theory, both non-pecuniary damages (e.g., pain and suffering) and pecuniary damages (e.g., lost wages, medical expenses) would be precluded. There either is a survivorship action for pre-death injuries and their associated pecuniary and non-pecuniary damages, or there is not.

The only question remaining, then, is whether, if a general maritime survival action exists, may it be asserted in addition to a death action under DOHSA? Petitioners argue "yes" because there is no overlap with DOHSA remedies. A survival action does not encroach upon the scope of DOHSA's coverage. And there is no indication that Congress, in enacting DOHSA, intended to preclude the maritime courts from creating remedies under their traditional powers to formulate judge-made

law in admiralty matters in areas where Congress has not spoken.[2]

ARGUMENT

I. CALLING DOHSA "COMPREHENSIVE" LEGISLATION DOES NOT ANSWER THE QUESTION PRESENTED.

Much of the defense of the ruling below is based on the argument that DOHSA is "comprehensive" legislation and that the Courts are not free to alter it. Respondent's Opposition Brief at 10-28; Brief of *Amicus Curiae* at 6-26. Restating those arguments in traditional preemption terms, DOHSA "occupies the field," and the Courts are not free to change it. However, the critical question is: how is "the field" defined?

As both Respondent and the United States recognize (Respondent's Opposition Brief at 11, n.9, Brief of *Amicus Curiae* at 5), a wrongful death claim and a survivorship claim are not simply different ways of describing the same remedy. Wrongful death recovery, at least in DOHSA, is a remedy available to certain categories of relatives who will suffer after a person's death by reason

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[2] It is curious that the Government puts its "oar into the water" with this issue as it admits that its liability in maritime matters is governed by the Suits in Admiralty Act, 46 U.S.C. App. § 741, *et seq.*; Public Vessels Act, 46 U.S.C. App. § 781, *et seq. See*, Brief of *Amicus Curiae* at 1. In this instance, the Solicotor General is not acting as the voice of the Executive Branch on policy issues, but as an interested party as the operator of ocean-going vessels.

of that death, typically by reason of loss of economic support. Under other statutes and general maritime law, wrongful death damages may be recovered for loss of emotional support (e.g., loss of society), which arise only after the death. *See, Sea-Land Services, Inc. v. Gaudet, supra,* 414 U.S. at 587, n.21.

By way of contrast, in a survivorship action, all of the injuries occur prior to death and have been sustained by the decedent. Because the claim is that of the decedent, which is carried forward after his death, it is irrelevant whether he has any heirs whom he is obligated to support. If the claim is successful, the money goes to his estate and is distributed along with his other assets, after payment of all the estate's expenses and debts.

These differences are important because they demonstrate that wrongful death and survivorship claims differ far more than in name only. There is no reason to believe that, when Congress provided for a wrongful death remedy under DOHSA, survivor claims were inevitably part of that same "field" and, hence, were precluded by DOHSA.

The legislative history cited by the Government does not, as it suggests, confirm that Congress intended to preclude a survival action. Brief of *Amicus Curiae* at 13-26. The debate on whether to enact a DOHSA-type statute lasted over a decade during which time the composition of Congress changed, as did the interests of the legislators. There are no clear and unequivocal statements of purpose or intent other than the language of DOHSA

itself, which is silent as to a survivorship action. If anything is clear from the legislative history it is that Congress wanted to provide a death action remedy. Thereafter, the debate was, in part, on whether to use as models the Lord Campbell's Act,[3] state death statutes, FELA,[4] or some other analogue. *Id.* at 16-18. Although Congress used Lord Campbell's Act somewhat as a model, the language of DOHSA as adopted does not contain the requirement contained in the Lord Campbell's Act that there exist an action that the decedent himself could have maintained as of the time of death, nor did DOHSA require an election of remedies either for injuries or for death, as did FELA. Since DOHSA contains neither the requirement nor the election, there are no statutory limitations which would preclude recovery in both the death action and a personal injury action. *See*, Petitioners' Brief on the Merits at 13-16. Therefore, the debate about what was or what was not available under state wrongful death statutes or under Lord Campbell's Act is just part of the process that Congress went through to decide the parameters of the death action it wanted to enact.

The other crucial point at issue in the Congressional debates was whether to legislate into territorial waters where states' laws had traditionally held sway. *See*, R. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 118-21 (1921). Thus, the question arose whether a cause of action could be brought under both the federal statute and state wrongful death statutes. Brief of *Amicus Curiae*

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[3] Lord Campbell's Act, 9 & 10 Vict., c.93 (1846).

[4] Federal Employer's Liability Act (FELA), 35 Stat. 65 (1908), as amended 46 U.S.C. §§ 51-60 (1988 ed.)

at 17-18. Congress decided not to extend coverage of DOHSA into territorial waters. It also decided to make it exclusive for the *death action* in the geographical area it covered such that there would be no separate action under state wrongful death statutes.

Furthermore, the colloquy between Mr. Stafford and Mr. Wm. Ezra Williams cited by the Government at page 19 only infers that Congress did not intend to include in DOHSA a recovery for the decedents' *heirs'* mental anguish and grief; the quoted discourse takes place in a discussion of what was "fair and just compensation" to the *heirs* under the proposed language of DOHSA. Whether or not the heirs can recover for grief as a result of the decedent's death says nothing about whether the estate can recover for the decedent's pre-death losses, both pecuniary and non-pecuniary.

The Government's further argument that witnesses who testified before Congress understood the legislation to be "the only right of action enforceable in this country for *death* resulting from negligence on the high seas" (Brief of *Amicus Curiae* at 20, emphasis added) only confirms what Petitioners conclude: that for *wrongful death* actions resulting from wrongful conduct on the high seas, DOHSA is the remedy.

Lastly, the Government's argument that DOHSA should be compared with FELA and its 1910 Amendment to provide a survivorship provision misses the point. The original FELA required an election either to recover for personal injuries or to recover for wrongful death. *Sea-Land Services, Inc. v. Gaudet, supra,* 414 U.S. at 582 n.9, citing *Seaboard Air Line R. Co. v. Oliver,* 261 Fed. 1, 2 (1919). The 1910 Amendment abrogated that election

requirement. DOHSA never contained such an election, so it cannot be said that Congress' retreat from that requirement in FELA was intended to infer that the Courts were precluded from developing a remedy not contained in DOHSA.

The fact that the Jones Act provides for both wrongful death and survivor actions also does not help Respondent. The Jones Act, like FELA and the Longshore and Harbor Workers Compensation Act, deals with the liability of an industry towards those whom it employs. Once Congress stepped in to legislate for an entire industry, it made great sense for it to take a comprehensive approach, much as it did for railroad workers in FELA,[5] so that all parties in that industry would know exactly where they stand, rather than leaving some parts up to the courts. But for deaths on the high seas, which are not limited to a single industry nor to an employer-employee relationship, the situation is very different. There is no organized groups of employees who are potential victims. Indeed, the coverage of DOHSA is not even limited to traditional maritime torts, as the submitted case graphically illustrates. Instead of an industry-specific law, DOHSA is an injury-specific law (death) and one that is limited to wrongful conduct in a limited location (the high seas). The logic that led to a comprehensive law for seamen and harbor workers has almost no relevance to the question of whether that approach should be followed under DOHSA. Instead, to decide whether the "field" of wrongful death was intended to include claims

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[5] Indeed, Congress Incorporated FELA wholesale as the remedy for Jones Act seamen.

of survivorship, but to provide no remedy for them, it is necessary to employ the usual tools of statutory construction, a task to which we now turn.

II. DOHSA DOES NOT CONTAIN LANGUAGE THAT SUPPORTS PREEMPTION OF SURVIVORSHIP CLAIMS.

There is, of course, no preemptive language in DOHSA. To be sure, in 1920 there were no common law causes of action for survivorship, but there are other features of the Act that are consistent with Petitioners' views that Congress did not intend to preempt the claims at issue before the Court.

DOHSA was a rights-creating law, designed to mitigate what had come to be recognized by all as the harsh rules against common law claims for wrongful death believed to exist because of *The Harrisburg*, 119 U.S. 199 (1886). Congress clearly did not want a wrongdoer to escape all liability when his wrong caused the death of the victim. Following similar logic, why would Congress, as Respondent and the Government suggest, not only have deliberately disallowed claims of survivorship, but also intended to prohibit the maritime courts from devising their own remedies and thereby allowing the wrongdoer to escape responsibility for the pre-death harms that it had caused? Petitioners are aware of no such reasoning, and none of the legislative history cited by Respondent or the United States reveals any. The most that can be said is that Congress did not include such claims in DOHSA, just as it limited wrongful death claims under DOHSA to those occurring on the high seas but not in territorial

waters. In the latter situation, this Court rejected similar preemption claims in both *Moragne, supra,* and *Yamaha, supra,* and allowed the Courts to acknowledge common law claims that were outside the scope of DOHSA. It should do so here as well.

Respondent and the United States rely heavily on section 765 (46 U.S.C. App. § 765) which provides that a pre-death action brought for personal injuries "may" be converted into a wrongful death action if the victim dies. Since there were no claims based on survivorship in 1920, that approach is consistent with a rights-granting view of the Act, but is not inconsistent with the possibility that a survivorship claim might exist alongside of the DOHSA wrongful death claim. The 1920 statute of limitations (the now-repealed 46 U.S.C. § 763) began to run from the date of the wrongful act, so that if a person lived more than two years, the DOHSA claim would be barred, but for section 765. Petitioners do not contend that section 765 must be explained solely on that basis, but it is surely a plausible explanation and, thus, Respondent's charge (Respondent's Brief at 23) that Petitioners have rendered section 765 a nullity is misguided.

On the other side, there is 46 U.S.C. App. § 763(a), added in 1980, ten years after this Court decided *Moragne*. The new section establishes a three year statute of limitations for all maritime torts arising from the time that tort accrues. The section specifically recognizes the possibility that maritime torts can give rise to "a suit for recovery of damages for personal injury or death, or

both"[6] – precisely the situation here. Although 46 U.S.C. App. § 763(a) covers more than torts occurring on the high seas, Congress chose to insert this provision in the same place in DOHSA as had been the prior statute of limitations for DOHSA, which Congress repealed in the same law. Petitioners believe that section 763(a) is a strong indication that, if Congress ever intended to preempt survivorship claims, it revoked that intention in 1980 and left the courts free to continue on the path begun in *Moragne*. At the very least, sections 765 and 763(a) cancel each other out on the issue of preemption, leaving Respondent and the United States with only the fact that the rights set forth in DOHSA are different from those in a typical survivor claim. However, that difference merely establishes the question, since without those differences there would be no issue. In order to answer it, we turn to the one rule of law which Respondent and the United States do not discuss: the presumption against preemption.

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[6] The legislative history of § 763(a) refers to the Jones Act, which provided for both kinds of remedies and already had a three year statute of limitations; DOHSA, which previously had a two year statute of limitations from the date of the wrongful conduct; and general maritime law, which was not discussed as either inclusive or exclusive of both kinds of remedies, but which had no defined statute of limitations, rather, was governed by the common law equitable doctrine of laches. *See*, 126 Cong. Rec. 3303-3306 (1980).

III. THE PRESUMPTION AGAINST PREEMPTION CONFIRMS THAT SURVIVORSHIP CLAIMS ARE NOT ELIMINATED BY DOHSA.

Respondent and the United States can barely manage to include the word "preemption" or any of its derivatives, anywhere in their briefs. Yet, there can be no doubt that theirs is a preemption argument since it is allegedly the passage of DOHSA that is the sole barrier to Petitioners' right to sue for the pain and suffering sustained by their decedents. The reason why they are so reluctant to discuss this case in preemption terms is that there is a very strong presumption against preemption of common law remedies through all areas of the law.

Preemption can be either express or implied. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992), citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the instant case, there is no express preemption in DOHSA of survival actions. However, even in express preemptive statutes, the Courts must inquire into the scope of the law which Congress intended to invalidate, *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996), by looking at Congressional purpose as defined by the language of the statute and the statutory framework, *id.* at 716, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992). It is clear, however, that there is no express Congressional language in DOHSA invalidating the maritime courts from developing common law survival actions.

Although *Medtronic, supra*, addressed express preemptive provisions, its reasoning as to why the Court should not preempt common law claims is applicable

here. The issue in *Medtronic* was whether preemptive language in the Medical-Device Amendments of 1976[7] was intended to preempt state common law negligence and products liability claims. In holding that common law claims were not preempted, the Court noted that it would be "difficult to believe that Congress would, without comment, remove all means of judicial recourse[8] for those injured by illegal conduct," 116 S. Ct. at 2251, citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Similarly, if Respondent's and the United States' approach is followed, there will be no judicial recourse to recover for pre-death injuries occurring from wrongful conduct on the high seas to non-seafarers.

Prior cases by this Court have evidenced a reluctance to preempt common law causes of action even where the statute at issue contained some preemption language. *See*, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524-30 (1992) which permitted Petitioner to maintain some common law actions using theories of the case that did not run afoul of the preemption statute. *See also, Conrail v. Gottshall*, 512 U.S. 532, 534 (1994) in which the Court noted that, unless common law principles were expressly rejected by FELA, common law is accorded great weight in the Courts' analysis and, where the statute is silent on the issue, common law principles must be applied. Where, as in DOHSA, there is absolutely no preemptive

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[7] Federal Food, Drug and Cosmetic Act, § 513(a)(1)(A,B,C), as amended 21 U.S.C.A. § 360c(a)(1)(A,B,C) and § 360k(a).

[8] The Act did not provide for a private right of action under the statute itself, 116 S. Ct. at 2250, so any judicial recourse had to come from the common law claims.

language, the Court should be wholly reluctant to displace the common law survival action remedy for pre-death injuries.

Under implied preemption principles, federal law only preempts state law (statutory or common law) if Congress evidences an intent to occupy the field or, if the entire field is not occupied, federal law preempts state law where the state law conflicts with the federal law or is an obstacle to accomplishing the objectives of the federal enactment. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984), citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Common*, 461 U.S. 190, 203-04 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also, Medtronic, supra*, 116 S. Ct. at 2249-50.

In neither the express language of DOHSA or the legislative history is there a clearly articulated purpose of Congress to occupy the field of survivorship claims for pre-death injuries where the wrongful conduct occurs on the high seas. Nor does a general maritime law survival action conflict with DOHSA, which addresses death remedies. Nor would recognition of the survivorship remedy conflict with the objectives of DOHSA. To the contrary, it would complement the objectives of DOHSA by holding the wrongdoer responsible for the injuries his wrongdoing inflicts. This is particularly true since there is no federal policy of denying an estate the right to recover damages sustained by a decedent or of giving a wrongdoer a windfall where the victim eventually dies from the

wrongful conduct. Thus, even without the strong presumption against preemption, there is no basis for inferring an intent to preclude the remedy sought here.

IV. THE SURVIVAL REMEDY COVERS ALL PRE-DEATH INJURIES.

This Court's decision acknowledging or rejecting a survivorship remedy for pre-death injuries to non-seafarers will apply to all pecuniary (e.g. loss of earnings, medical expenses) and non-pecuniary (e.g. pain and suffering) damages sustained as a result of wrongful conduct on the high seas that ultimately leads to the victim's death. If the injured individual survives sufficient time to incur lost wages and medical expenses and is unable to recover for those losses in a personal injury action before his death, such damages will not be recoverable under the pecuniary loss provisions of DOHSA, section 762. As Respondent and the United States repeatedly emphasize (Respondent's Brief at 16; *Amicus Curiae* Brief at 3), section 761 limits those who may sue under DOHSA to the "decedent's wife, husband, parent, child, or dependent relative," and section 762 provides for their recovery but only of "the pecuniary loss sustained by [them] . . . in proportion to the loss they may have suffered by reason of the death of the [decedent]." As this Court's decision in *Zicherman* made clear, those losses are principally for loss of economic support to which they would have been entitled.

In these days of extraordinary medical advances, there is an ever-increasing likelihood that a person seriously injured may survive several years before dying of

his injuries and, in that time, earn none of his salary and incur huge medical and other expenses. If the survivorship claim is wiped out, as Respondent urges, all of those pecuniary losses would be unrecoverable, as would be damages for pain and suffering. But because those losses were sustained by the decedent and not "sustained by the persons for whose benefit the suit is brought" as section 762 requires, the defendant would reap a huge windfall unless the personal injury claim could be resolved before the accident victim died.

Moreover, if the decedent incurred large expenses for his medical care, but did not pay them, hoping to use his tort judgment for that purpose, those debts would remain to be paid by his heirs, but with no money from the wrongdoing defendant to satisfy them. Whatever Congress may have had in mind in 1920 when it passed DOHSA, there is absolutely no evidence that it intended to foreclose the traditional capacity of maritime courts to provide relief in such a situation, yet that is the inevitable result of Respondent's position and that of the United States.

CONCLUSION

For all of the foregoing reasons and for those set forth in Petitioners' Brief on the Merits, the decision of the Court below should be reversed and the cases remanded to the district court for further proceedings.

Dated: Tuesday, April 7, 1998

Respectfully submitted,

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No. 97-704

In the Supreme Court of the United States

OCTOBER TERM, 1997

PHILOMENA DOOLEY, ET AL., PETITIONERS

v.

KOREAN AIR LINES CO., LTD.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the personal representative of a person who died as a result of injuries incurred on the high seas may seek damages for the decedent's pre-death pain and suffering.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-704

PHILOMENA DOOLEY, ET AL., PETITIONERS

v.

KOREAN AIR LINES CO., LTD.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States operates thousands of ocean-going vessels and aircraft in the course of its extensive civilian and military activities. In general, the United States has waived its sovereign immunity from civil suits arising within admiralty jurisdiction and is subject to wrongful death actions in ways similar to those involving private parties. See Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*; Public Vessels Act, 46 U.S.C. App. 781 *et seq.* The United States, therefore, has a strong interest in encouraging fair and uniform remedies that are harmonious with the intent of Congress as enacted in the Death on the High Seas Act (DOHSA), 46 U.S.C. App. 761 *et seq.*[1]

[1] As a matter of policy, the United States is not opposed to the recovery of damages reflecting the pain and suffering of air line passengers whose injuries result in death. The Department of Transportation (DOT) has supported H.R. 2005, 105th Cong., 1st Sess., a bill currently pending before Congress that would permit recovery for the decedents' pain and suffering in cases such as this by rendering the DOHSA inapplicable to aviation-related deaths on the high seas. Letter dated July 28, 1997, from DOT General Counsel Nancy E. McFadden to Rep. Bud Shuster, Chairman, House Committee on Transportation and Infrastructure. As a matter of statutory construction and application of

STATEMENT

1. Before Congress enacted the Death on the High Seas Act (DOHSA) in 1920, the law of admiralty permitted the anomaly, grounded in the common law, that a person injured by the tortious conduct of another could sue for damages, but no action could be brought by or on behalf of a person killed by that conduct. See generally Robert M. Hughes, *Handbook of Admiralty Law* 223 (2d ed. 1920). The harsh rule denying compensation when the victim died stemmed from the theory that a right of action was personal to the victim, and so expired when the victim died. As this Court explained over a century ago:

> [I]n the absence of an act of Congress or of a statute of a State, giving a right of action therefor, a suit in admiralty could not be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which was caused by negligence.

The Alaska, 130 U.S. 201, 209 (1889). See also *The Harrisburg*, 119 U.S. 199 (1886) (same).

By the beginning of this century, the injustice of that rule had prompted proposals in Congress to override the maritime doctrine denying recovery for negligent acts that resulted in death. The first bill to provide a remedy for death on the high seas that received a hearing was introduced on December 17, 1909. See 45 Cong. Rec. 245. That bill was drafted and promoted by the Maritime Law Association.[2] Congress thereafter held hearings on, debated, and amended versions of the death on the high seas legislation until final enactment of the DOHSA in 1920.

Section 1 of the DOHSA provides a right of action for "the death of a person * * * caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." 46 U.S.C. App. 761. The action must be brought by the decedent's personal representative, "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." *Ibid.* "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." DOHSA § 2, 46 U.S.C. App. 762. The DOHSA also speaks to the question of what happens to a pending personal injury claim upon the death of the injured person. Section 5 provides that, if a person brings a suit in admiralty for personal injuries wrongfully inflicted on the high seas and then dies before the suit can be brought to judgment, "the personal representative of the decedent may be substituted as a party and the suit may proceed * * * for the recovery of the compensation provided in section 762." DOHSA § 5, 46 U.S.C. App. 765. The DOHSA makes no provision for the decedent's own losses, nor does it allow any damages for non-pecuniary losses.

2. On September 1, 1983, Korean Air Lines (KAL) Flight KE007 strayed off course and flew over the airspace of the former Soviet Union. The airliner was shot down by Soviet military forces and crashed into the Sea of Japan. All 269 passengers were killed. The suits brought in the United States in several district courts were consolidated for a trial on liability in the District of Columbia. The jury concluded that respondent had engaged in "willful misconduct," a finding that lifted the $75,000 cap on dam-

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this Court's decisions, however, we believe that recovery for pain and suffering is inconsistent with the existing statutory regime prescribed by Congress under the DOHSA, 46 U.S.C. App. 761 *et seq.*

[2] See *To Authorize the Maintenance of Actions for Negligence Causing Death in Maritime Cases; To Permit the Owners of Certain Vessels and the Owners or Underwriters of Cargoes Laden Thereon To Sue in the U.S.; Liens on Vessels for Repairs, Supplies, or Other Necessaries: Hearing Before the House Comm. on the Judiciary*, 61st Cong., 2d Sess. (1910) (available on microfiche CIS No. 61 HJ-T.3) (*1910 Hearing*). In 1900, Representative Boutell introduced a bill pertaining to actions against steamship companies that was later described as being the first death on the high seas legislation, but that proposal was never acted upon. See 33 Cong. Rec. 2611; Robert M. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 117 (1921).

ages under the Warsaw Convention in cases of ordinary negligence. See *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476-1478 (D.C. Cir.), cert. denied *sub nom. Dooley* v. *Korean Air Lines*, 502 U.S. 994 (1991).

Subsequently, the multidistrict litigation panel returned all of the cases to the district courts where they were originally filed for the determination of damages. One of those damages proceedings reached this Court in *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 219-220 (1996). *Zicherman* involved claims for damages brought by the mother and sister of one of the KAL flight KE007 passengers for grief, mental anguish, and loss of society. The *Zicherman* Court concluded: "Where, as here, an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law. Because DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society." *Id.* at 231. *Zicherman* expressly left open "whether [DOHSA] § 762 contradicts the District Court's allowance of pain and suffering damages," since KAL did not challenge that ruling in its petition for a writ of certiorari. *Id.* at 230 n.4. See also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 215 n.1 (1986) (same).[3]

3. Petitioners are the personal representatives of several KAL Flight KE007 passengers who seek recovery for the pain and suffering experienced by the decedents between the time the aircraft was damaged by the Soviet antiaircraft missile and when it crashed on the high seas. Pet. Br. 3. On KAL's motion, the district court dismissed all claims for non-pecuniary damages. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996).

[3] Prior to *Zicherman*, two circuits had allowed decedents' personal representatives to "supplement" their pecuniary damages recovery under DOHSA for pre-death pain and suffering under a theory of general maritime law. See *Azzopardi* v. *Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-894 (5th Cir. 1984); *Barbe* v. *Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974). The Ninth Circuit, however, refused to do so in one of the post-*Zicherman* cases arising out of the KAL Flight KE007 incident, and this Court declined further review. *Saavedra* v. *Korean Air Lines*, 93 F.3d 547, 553-554 (9th Cir.), cert. denied, 117 S. Ct. 584 (1996). Other circuits had allowed such recovery under state survival statutes. See, *e.g.*, *Solomon* v. *Warren*, 540 F.2d 777, 792 n.20 (5th Cir. 1976); *Dugas* v. *National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971).

The court of appeals affirmed. Pet. App. 1a-18a. Relying on this Court's decision in *Mobil Oil Co.* v. *Higginbotham*, 436 U.S. 618 (1978), the court stated:

> Nonpecuniary damages may be recovered under general maritime law, but not, the Court held [in *Higginbotham*], when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages.

Pet. App. 9a. The court of appeals further observed that the DOHSA "contains only a very limited survival provision" (46 U.S.C. App. 765), which should be treated as "an expression of legislative judgment on the extent to which survival actions are to be permitted." Pet. App. 10a. But see *Gray* v. *Lockheed Aeronautical Systems Co.*, 125 F.3d 1371 (11th Cir. 1997), petition for cert. pending, No. 97-1209.

SUMMARY OF ARGUMENT

Although they arise from the same tortious act or omission, wrongful death and survival actions are legally distinct. That distinction was well understood by Congress in 1920 when it enacted the Death on the High Seas Act (DOHSA), 46 U.S.C. App. 761 *et seq*. The text of the Act provides three clear indications that Congress intended to limit the remedies in the DOHSA to a wrongful death action. Section 1 of the DOHSA, 46 U.S.C. App. 761, limits who can maintain the suit to the "personal representative" of the decedent, as opposed to the executor or administrator of the decedent's estate, as was common for state survival statutes enacted in that era. Section 2, 46 U.S.C. App. 762, limits the damages recoverable under the Act to compensation for "pecuniary loss" that can be established

by the persons who have lost the support of the decedent. Finally, Section 5 of the Act, 46 U.S.C. App. 765, permits the survival of a personal injury suit, but only for the limited purpose of allowing it to be transformed into a wrongful death action as prescribed by the Act. Petitioners' reading of that provision to provide concurrent wrongful death and survival actions would denude Section 5 of its natural and ordinary meaning.

Contrary to petitioners' submission, which contains scant discussion of the legislative history of the DOHSA, that history in fact demonstrates that Congress knew how to distinguish between survival and wrongful death actions, that it deliberately rejected several amendments to provide a survival remedy in earlier versions of the DOHSA, and that it made those choices to limit the liabilities faced by shipowners. That history removes any doubt that Congress meant exactly what it provided for in the Act.

Finally, this Court's decisions have recognized that general maritime law may provide supplementary remedies in the absence of an Act of Congress on the subject. That is not the case with respect to deaths on the high seas, however. This Court's cases have consistently held that, for such deaths, plaintiffs are limited to the remedies provided by the DOHSA. See *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 229 (1996); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 232 (1986); *Mobil Oil Co.* v. *Higginbotham*, 436 U.S. 618, 625 (1978).

ARGUMENT

CONGRESS DID NOT INTEND FOR THE JUDICIARY TO SUPPLEMENT THE WRONGFUL DEATH ACTION PROVIDED IN THE DEATH ON THE HIGH SEAS ACT WITH A SURVIVAL ACTION FOR NON-PECUNIARY PAIN AND SUFFERING

In *Zicherman*, this Court held that the Warsaw Convention, rather than providing its own measure of damages, "permit[s] compensation only for legally cognizable harm" and "leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the

forum's choice-of-law rules." 516 U.S. at 231. The Convention thus "provides nothing more than a pass-through, authorizing [the Court] to apply the law that would govern in the absence of the Warsaw Convention." *Id.* at 229. The Court concluded in *Zicherman* that the DOHSA is the federal law applicable to deaths on the high seas. Moreover, "where DOHSA applies, neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Id.* at 230 (citing *Tallentire*, 477 U.S. at 232-233 and *Higginbotham*, 436 U.S. at 625-626).

Petitioners' contention that general maritime law nevertheless should provide a supplementary survival remedy for pain and suffering damages is unpersuasive. Both the text and legislative history of the DOHSA establish that Congress specifically considered and rejected providing a survival action. Moreover, this Court's decisions establish that general maritime law should not supplement statutorily-created remedies for deaths on the high seas.

A. The Language And Structure Of The DOHSA Evince Congress's Intent To Limit Remedies For High Seas Deaths And Not To Permit A Survival Action

When Congress enacted the DOHSA in 1920, it legislated against the backdrop of rules long established in admiralty law and at common law. Those judge-made doctrines created the rule, *actio personalis moritur cum persona*, which eliminated a right of recovery if the victim of a tort died. See generally Frances B. Tiffany, *Death By Wrongful Act* § 15 (2d ed. 1913). In overriding the common-law doctrine embodying that rule, state legislatures had recognized two distinct sets of injuries from a death caused by negligence and provided different remedies for each type of loss. A "wrongful death" statute redresses the losses incurred by the decedent's dependents. A "survival" statute permits recovery for injuries sustained by the victim of the tort. See generally *id.* §§ 22-26; Robert M. Hughes, *Handbook of Admiralty Law* 222-223 (2d ed. 1920). In the DOHSA, Congress provided only for recovery of damages for wrongful death, and chose not to pro-

vide an action for survival damages. Petitioners ask this Court to infer that Congress intended to leave the judiciary free to develop a survival cause of action for deaths on the high seas. That submission is inconsistent with the plain language of the DOHSA, which in three respects makes clear that Congress intended to foreclose a survival action for deaths on the high seas.[4]

1. First, Congress specified for whose benefit the suit may be brought. Section 1 of the Act provides that "the personal representative of the decedent may maintain a suit for damages * * * *for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative.*" DOHSA § 1, 46 U.S.C. App. 761 (emphasis added). The inclusion of that language contrasts with the terms used in state survival statutes of that era, which generally specified that a survival action could be brought on behalf of the decedent's estate.[5] That distinction is important,

[4] From Lord Campbell's Act in 1846 (9 & 10 Vict. ch. 93) to the present time, abrogations of the common law rule that a personal injury action dies with the plaintiff have been accomplished overwhelmingly (perhaps exclusively) by legislative act. See Stuart M. Speiser, Charles F. Krause & Juanita M. Madole, *Recovery for Wrongful Death and Injury*, Appendix A (3d ed. 1992) (collecting statutes).

[5] See, *e.g.*, Conn. Gen. Stat. ch. 325, § 6177 (1918) ("No cause or right of action shall be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of such deceased person."); Mich. Comp. Laws § 10,113 (1897) ("In all personal actions, the cause of which does by law survive, * * * the action may proceed and be prosecuted by or against the surviving party, and by or against the executor or administrator of the deceased party, in the manner provided in this chapter."); 1901 N.H. Laws ch. 191, § 6 ("If a right of action existed in favor of or against the deceased at the time of his death, and survives, an action may be brought by or against the administrator at any time within two years after the original grant of administration.").

State wrongful death provisions, by contrast, permitted suit only by the "personal representative" of the decedent, in much the same manner as the DOHSA provides. See, *e.g.*, 2 N.J. Comp. Stat. 1907, §§ 7-9 (1909-1910); 1910 Or. Laws §§ 378-380; Vt. Stat. ch. 133, §§ 2835, 2839, 2840 (1906); Va. Code Ann. §§ 2902-2906 (Pollard 1904). See generally

because it reflects an intent by Congress in the DOHSA to remedy the harm caused to the decedent's dependents by the wrongful death—loss of support—and not to benefit the decedent's estate, which may or may not inure to the same beneficiaries.

Second, Congress specified what kind of damages could be obtained. Section 2 of the DOHSA, 46 U.S.C. App. 762, provides that "[t]he recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought." At the time the DOHSA was enacted, the distinction between pecuniary and non-pecuniary losses was well settled in state statutory law.[6] Pecuniary losses referred to those damages that could be quantified economically, such as lost wages or educational expenses for a de-

Tiffany, *supra*, at xx-lxxi (analytical table summarizing state wrongful death and survival statutory provisions).

[6] A number of States that permitted wrongful death actions limited recovery to "pecuniary" damages that could be shown by dependents of the decedent. See, *e.g.*, Nev. Rev. Laws § 5648 (1912) ("jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named"); Ohio Gen. Code §§ 10,770, 10,772, 10,773, 10,773-1 (1912) (limiting recovery in § 10,772 to damages "not exceeding in any case twelve thousand dollars, as the jury may think proportional to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought"); S.D. Codified Laws ch. 301, §§ 1-3, at 444a (1909) (limiting jury's discretion to award damages to $10,000, "as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought"); Vt. Stat. ch. 133, § 2840 (1906) (imposing no monetary cap, but limiting damages "to the pecuniary injuries resulting from such death, to the wife and next of kin"); Wis. Stat. ch. 178, §§ 4255-4256 (1898) (limiting jury to maximum of $5,000, "as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relatives of the deceased specified in this section").

pendent. Non-pecuniary losses, on the other hand, consisted of damages like mental anguish and physical pain that bore no relation to a verifiable economic value.[7] By explicitly limiting the damages to "pecuniary losses," Congress made plain its intent not to permit compensation for "non-pecuniary" damages, such as for the decedent's pre-death pain and suffering.

Third, Congress understood the difference between a death action and a survival action that conceptually perpetuates a personal injury suit. In contrast to state survival provisions, which specifically stated that an action would survive the decedent, the DOHSA contains no such provision. Instead, Congress provided only a very limited survival provision in the DOHSA for situations in which an injured victim brought a personal injury suit and then died before that suit was completed; in that event, Congress provided that the decedent's personal representative could, if the other elements of the Act are satisfied, transform the suit into the kind of wrongful death action recognized under the Act. Section 5 of the DOHSA, 46 U.S.C. App. 765, thus states that "the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this [title]."

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[7] See, *e.g.*, *Tilley* v. *Hudson River R.R.*, 24 N.Y. 471, 476 (Ct. App. 1862) ("[T]he word *pecuniary* was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value."). See generally Tiffany, *supra*, at 332-333. Some state statutes explicitly drew that distinction. See, *e.g.*, 1901 N.H. Laws ch. 191, § 12 ("If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by him in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damage in connection with other elements allowed by law.").

The dependents, in turn, are not permitted to obtain recovery in all of the same ways as the victim, but rather are limited to the "fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." DOHSA § 2, 46 U.S.C. App. 762. The court of appeals correctly observed that Section 5 of the DOHSA is "a very limited survival provision" that should be treated as "an expression of legislative judgment on the extent to which survival actions are to be permitted." Pet. App. 10a. That holding is in accord with this Court's conclusion in *Higginbotham* that "survival" of an action was one of the issues that Congress specifically considered, and "when [the DOHSA] speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U.S. at 625.

2. Petitioners' alternative readings (Pet. Br. 31-33) of the statutory language are unpersuasive. They first contend (*id.* at 32) that the permissive phrase in Section 5 ("may proceed") provides the decedent's personal representative with an option to *choose* whether to continue the action as a wrongful death suit under the DOHSA or as a survival action under the general maritime law. That construction, however, largely renders Section 5 surplusage. If the general maritime law permitted survival actions in these circumstances, then, upon death resulting from injuries, a wrongful death action under the DOHSA *and* a survival action under general maritime law would both lie. Section 5 would not be needed to protect the rights of a decedent's dependents. Given that a statute should be construed to avoid rendering particular provisions superfluous, see, *e.g.*, *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991), the more logical construction of Section 5 is that Congress did not intend to allow the decedent's personal injury suit to survive his or her death, but instead envisioned the case being converted to a wrongful death action, so long as there were pecuniary losses to qualified claimants under DOHSA Sections 1 and

2.[8] The "may proceed" language of Section 5 simply reflects Congress's decision to give decedent's dependents an option that they did not have at common law, not to provide an option of a survival action that would make the rest of the provision largely meaningless. Indeed, Congress could not have affirmatively intended to recognize a survival action under general maritime law, since *Moragne* v. *State Marine Lines*, 398 U.S. 375 (1970), which furnishes the bases for such an action, was not decided until fifty years after passage of the DOHSA. See Pet. Br. 13.

Second, petitioners contend (Pet. Br. 29-31) that the replacement of DOHSA Section 3 in 1980 with 46 U.S.C. App. 763a[9] "acknowledges Congress' approval" of coexisting survival actions that would be inconsistent with the limitations of DOHSA Sections 1, 2, and 5. They posit that the more general language of Section 763a, which specifies the triggering date for the statute of limitations as the date when "the cause of action accrued," suggests that "there is no Congressional policy to preclude the survival of actions for personal injuries which may be brought concurrently with a DOHSA death action." Pet. Br. 31. Petitioners' argument fails to acknowledge the full scope of 46 U.S.C. App. 763a in admiralty actions. By its plain terms and purpose, 46 U.S.C. App. 763a replaced Section 763 with a more generally-applicable provision. Section 763a "provide[s] for a uniform national three-year statute of limitations in actions to recover damages for personal injury or death," Act of Oct. 6, 1980, Pub. L. No. 96-382, 94 Stat. 1525, as had been permitted in Jones Act suits. See

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[8] For example, a child who dies of such injuries might not have a "wife, husband, parent, child, or dependent relative" (Section 1) whose losses could be apportioned under Section 2. See 46 U.S.C. App. 761-762.

[9] 46 U.S.C. App. 763a provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

also H. R. Rep. No. 737, 96th Cong., 2d Sess. 1 (1980). Section 763a thus applies not only to DOHSA cases, but also to a wide variety of maritime torts occurring on the high seas, including unseaworthiness claims; accidents occurring within territorial waters, including the general maritime law claims for that limited geographic area authorized by *Moragne*, 398 U.S. at 393; and maritime torts occurring on land (such as those involving longshore and harbor workers). See *Friel* v. *Cessna Aircraft Co.*, 751 F.2d 1037, 1038-1039 (9th Cir. 1985).[10]

B. The Legislative History Of The DOHSA Confirms That Congress Deliberately Omitted A Survival Action

The foregoing reading of the text and structure of the DOHSA is strongly supported by its legislative history, which provides considerable evidence that Congress understood that the Act would establish a wrongful death action that would be the exclusive remedy available to the dependents of persons who died from injuries sustained on the high seas. Petitioners' discussion of the legislative history of DOHSA (Pet. Br. 26-29), which is confined to a single floor statement in the 66th Congress, is as mistaken as it is incomplete.[11]

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[10] For cases applying 46 U.S.C. App. 763a in various non-DOHSA contexts, see, *e.g.*, *Mendez* v. *Ishikawajima-Harima Heavy Indus. Co.*, 52 F.3d 799 (9th Cir. 1995); *Mink* v. *Genmar Indus., Inc.*, 29 F.3d 1543, 1547 (11th Cir. 1994); *Butler* v. *American Trawler Co.*, 887 F.2d 20 (1st Cir. 1989); *Cooper* v. *Diamond M Co.*, 799 F.2d 176 (5th Cir. 1986), cert. denied, 481 U.S. 1048 (1987); *Coleman* v. *Slade Towing Co.*, 759 F. Supp. 1209 (S.D. Miss. 1991); *Davis* v. *Britton*, 729 F. Supp. 189, 191 (D. N.H. 1989). Those decisions accord with the codifier's notes to Section 763a, which state that it "was *not* enacted as part of * * * the Death on the High Seas Act, which comprises this Chapter." 46 U.S.C. App. 763a, Codification Note (emphasis added).

[11] Petitioners assert (Pet. Br. 29) that "there is nothing in either DOHSA itself or the history back to its passage to suggest that Congress meant to deal with, let alone eliminate, survival actions." The sources on which they rely for that contention, however, are themselves incomplete. First, they cite Representative Volstead's floor statements when the bill was about to be passed. See *id.* at 27-28. They do not

414 U.S. 573, 583-591 (1974).[20] Similarly, state wrongful death and survival statutes may supplement a *Moragne* action for wrongful death occurring on state territorial waters when no federal statute specifies the appropriate relief and the decedent is not a seaman, longshore worker, or person otherwise engaged in the maritime trade. See *Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199 (1996). Relying, *inter alia*, on *Tallentire* and *Higginbotham*, the Court has distinguished federal maritime actions for wrongful death occurring on state territorial waters with those governed by the DOHSA by holding that "[w]hen Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided." *Id.* at 215. A death on state territorial waters does not present that concern.[21]

But when the death occurs on the high seas, as in this case, there is no gap to fill. The DOHSA—rather than the

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[20] Although the Court permitted nonpecuniary damages for loss of society in *Gaudet*, it held that "mental anguish or grief * * * is not compensable under the maritime wrongful-death remedy." 414 U.S. at 585 n. 17. *Gaudet* has subsequently been confined to its facts. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 31-32 (1990).

[21] The Court, as it had done in the past, declined to say whether the reasoning of *Moragne* may be extended to permit a survival cause of action under the general maritime law in the absence of a state survival statute. See *Yamaha Motor Corp.*, 516 U.S. at 210 n.7; see also *Miles*, 498 U.S. at 34. Several courts of appeals, however, have held that federal maritime law does provide for a survival cause of action in cases governed by *Moragne*. See, *e.g.*, *Wahlstrom* v. *Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1093 (2d Cir. 1993), cert. denied, 510 U.S. 1114 (1994); *Miles* v. *Melrose*, 882 F.2d 976, 986 (5th Cir. 1989), aff'd *sub nom. Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987); *Evich* v. *Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Barbe* v. *Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Spiller* v. *Thomas M. Lowe, Jr., & Assocs.*, 466 F.2d 903, 909 (8th Cir. 1972); *Greene* v. *Vantage S.S.*, 466 F.2d 159, 166 (4th Cir. 1972); *Ward* v. *Union Barge Line Corp.*, 443 F.2d 565, 569 (3d Cir. 1971), overruled in part on other grounds, *Cox* v. *Dravo Corp.*, 517 F.2d 620 (3d Cir. 1975) (en banc). That issue is not presented in this case.

general maritime law—governs the action, and the remedies provided in that Act cannot be supplemented by the federal maritime measure of damages recognized in *Gaudet* for *Moragne*-type causes of action arising from deaths in territorial waters.

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. *The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages.* The Act does not address every issue of wrongful-death law but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

Higginbotham, 436 U.S. at 625 (citations omitted; emphasis added); see also *ibid.* ("Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements."). Recognizing that there is "a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted," the Court held that "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Ibid.* (emphasis added). See also *Tallentire*, 477 U.S. at 230 (holding that DOHSA's pecuniary loss remedy could not be supplemented to include nonpecuniary damages otherwise recoverable under a seemingly applicable state statute, because it would be "incongruous" to think "that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas"). Thus, relying on its reasoning in *Higginbotham*, the Court in *Tallentire* held that "Congress has 'struck the balance for us' in determining that survivors should be restricted to the re-

covery of their pecuniary losses, and when DOHSA 'does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.'" *Id.* at 232 (quoting *Higginbotham*, 436 U.S. at 625).

Finally, even as it was reserving the question presented in this case, the Court in *Zicherman* underscored that the remedies in the DOHSA are exclusive when the death occurs on the high seas. 516 U.S. at 230 n.4. In that case the Court rejected an effort to supplement the DOHSA's pecuniary remedies standard with nonpecuniary damages for loss of society: "[W]here DOHSA applies, neither state law nor general maritime law can provide a basis for recovery of loss-of-society damages." *Id.* at 229 (citations omitted). Congress carefully considered and plainly rejected a provision that would have allowed a survival cause of action. It follows, therefore, that the DOHSA cannot be supplemented to authorize an award of the pre-death pain and suffering damages sought by petitioners in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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